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EVAN M. HINKSON, Administrator
of the Estate of Charlotte
E. Dorn,

Appellant,

v.

PAUL H. DAVIS, A. W. WAKELEY,
I. C. ELSTON, JR., GEORGE W.
HALL, H. I. MARKHAM, RALPH W.
DAVIS, T. E. MURCHISON, WALTER
M. GIBLIN, H. GREENE, LUTHER
DEARBORN, LYMAN BARR, and
FRANKLIN B. EVANS, Co-partners,
doing business as PAUL H. DAVIS
& CO.,

Appellees.

3-1-42
APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

313 I.A. 142

MR. PRESIDING JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

July 24, 1931 Charlotte E. Dorn brought an action against defendants, stock brokers, to recover the market value of 352 1/2 shares of Borg-Warner stock and a credit balance of \$1,472.58 which appeared in an account carried by defendants in her name.

She died testate April 23, 33, and Florence Hoover Wasson Hinkson was appointed executrix and subsequently she was substituted as plaintiff; later a motion was made in this court, and allowed, for leave to substitute Evan M. Hinkson, administrator of the estate of Charlotte E. Dorn, in place of the executrix, who had died. The case was tried without a jury and the court found the issues in favor of defendants, and plaintiff appeals.

Plaintiff argues that the account with the defendants in the name of Charlotte E. Dorn was in fact her account and she was entitled to recover the cash balance and the market value of the Borg-Warner stock which was in the account. Defendants say they never had any contractual relations with Charlotte E. Dorn; that the account on their books in her name was in fact the account of her husband, Dr. Gay Dorn, who requested that this account be opened to enable him to make additional subscrip-

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[illegible]

tions to stocks underwritten by the defendants. Hence, it is said, defendants are not liable.

March 15, 1924, Dr. Dorn opened an account with the defendants which was an active one, although there was a very large debit balance in this account at the time of his death on March 22, 1930. Dudley E. Simpson, defendants' customers' man, testified that defendants were underwriting Universal Theatre stock and the issue was being oversubscribed, and defendants adopted a house rule limiting the number of shares which any one customer could buy to 50 shares. Simpson testified that Dr. Dorn wanted to obtain 100 shares of this stock, but it was explained to him that 50 shares was all that could be sold to any one account; it was suggested that if Dr. Dorn would open an account in another name he could obtain 50 shares in the name of this other account; Dorn then told Simpson to open this other account in the name of his wife, Charlotte Dorn, and purchase an additional 50 shares of Universal stock in the name of that account, which was done. At the time this account was opened Mrs. Dorn was not present and was not consulted. No one connected with defendants had ever seen her, and from the time this account was opened on November 1, 1924, until Dr. Dorn's death on March 22, 1930, she never communicated with the defendants.

Plaintiff argues that the monthly statements of this account, mailed to Charlotte Dorn, is evidence that the account was hers. The evidence, however, shows that the partners of defendant were the only ones that knew the account was not that of Charlotte E. Dorn, and that the bookkeeping department sent out these monthly notices as a matter of routine.

Arthur G. Lilly, the office manager of defendants, wishing to make sure that Dr. Dorn understood he was the principal in the Charlotte E. Dorn account, had a conversation with him,

calling his attention to the fact that the Charlotte account showed a debit balance of \$1,550, and that money should be deposited either to pay for the stock or as a margin, and that defendants should have a customer's agreement from Mrs. Dorn and a check to represent the margin. Thereupon Dr. Dorn told Lilly that the account was not the property of Mrs. Dorn but that it was his own account, and he repeated to Lilly that the Mrs. Dorn account was opened so as to allow him to purchase an additional 50 shares of the Universal stock. Lilly had already authorized Simpson to open this account for this purpose.

November 13, 1924 shows a credit on the Charlotte E. Dorn account of \$387.50, and a similar credit is in the account carried in the name of Dr. Dorn. This is explained by the fact that on that date Dorn paid to the defendants his personal check for \$775, which represented 25 per cent of the purchase price, which was the required margin on 100 shares of Universal stock, and this check was credited, half to each account. Subsequently new issues of stock were underwritten by defendants, and as to each of these, defendants' house rule limited the amount of stock which could be purchased for any one account. Dorn subscribed for these new issues and divided them between his own account and the Charlotte Dorn account.

August 4, 1927, 100 shares of Marvel Carburetor stock were purchased on the Chicago Stock Exchange and charged to the account of Charlotte E. Dorn. Dr. Dorn's account shows that on May 17, 1927 he had purchased 200 shares of this stock. In these purchases there was no house rule limiting the amount that any subscriber could purchase. Subsequently the Marvel Carburetor Company merged with the Borg-Warner Company and the stock was called Borg-Warner stock. These corporations issued certain stock dividends which were received in odd quantities, and small

purchases were made. As the result of these the 100 shares of Marvel Carburetor had increased until, at the time of Dr. Dorn's death, the account in the name of Charlotte Dorn had 352 1/2 shares of Borg-Warner stock. These are the shares which are, in part, the subject matter of this litigation.

The accounts show further transactions in which Dr. Dorn made various payments to the defendants, which amounts were credited, half to the Charlotte Dorn account and the other half to the Dr. Dorn account. Various other transactions appeared, but they show that each time there was a purchase in the Charlotte Dorn account there was or had been a purchase of similar shares in the Dr. Dorn account, although Dr. Dorn's account shows that he made many purchases of various stocks carried in his own account and not in the account of Charlotte Dorn. September 30, 1929, the debit balance in the Dr. Dorn account was \$127,173.20, and the debit balance in the Charlotte Dorn account was \$15,583.21.

Between the years 1924 and 1929 the values of stocks increased by large amounts and defendants were apparently of the opinion that so long as the securities retained in the two Dorn accounts were considerably more than the amount of the combined debit balance, defendants were amply protected. However, in the latter part of October, 1929, the market crash wiped out Dr. Dorn's equity, although the Charlotte Dorn account showed ample equity, - but considered together they showed a debit balance.

Dr. Dorn was called to deposit margins but was unable to respond, and defendants started to sell securities in both accounts to reduce the combined debit balance. All the salable securities in both accounts were sold in November, except 500 shares of Bendix Aviation and 903 1/2 shares of Borg-Warner stock which stood in the Dr. Dorn account, and 352 1/2 shares of Borg-Warner which stood in the Charlotte Dorn account. This liquidation

reduced the debit balance in the Dr. Dorn account to something over \$93,000, and in the Charlotte Dorn account to \$740.68. The accounts thus stood until after Dr. Dorn's death. In December, 1929, there was a deficiency in the combined two accounts of approximately \$27,000. Dr. Dorn was asked to give defendants his note representing this deficiency, which he did.

It is in evidence that frequently customers of brokers purchase in numerous accounts, sometimes in fictitious names, and often in the name of another living person. After Dr. Dorn's death, March 22, 1930, Charlotte Dorn's attorney wrote to defendants notifying them of the death of Dr. Dorn and requesting defendants to note the fact of his death upon their records and to "conduct no further trades of any kind in his account or in any account that he may have carried in some other name." Defendants argue from this letter that both he and Charlotte Dorn understood that Dr. Dorn's two accounts with defendants were the accounts of the doctor, although one was carried in the name of Charlotte Dorn.

As the market still declined, all of the securities in both accounts were sold, leaving a combined debit balance in the two accounts of \$53,407.67, which with interest made the amount of the claim against Dr. Dorn's estate of over \$60,000. This claim was filed in the Probate court of Cook county. Charlotte first objected to the allowance of the claim because defendants had deducted from the amount of the debit balance shown in the Dr. Dorn account the balance which appeared in the Charlotte Dorn account, but finally she allowed the claim without contest, stipulating that the allowance of the full amount of the claim should be without prejudice to the rights of either of the parties in the cause now pending in the Circuit court of Cook county, -

referring to the instant case.

There is no claim that Dr. Dorn gave or assigned to her any part of the Charlotte Dorn account. The trial court could properly believe the explanation as to the opening of the Charlotte Dorn account in addition to his own: that is, to enable Dr. Dorn to purchase more stock than permitted by defendants' house rules.

Although counsel for plaintiff objected, the statements of Dr. Dorn to defendants at the time of opening the Charlotte Dorn account were properly admitted in evidence. As counsel for defendants say, they are not attempting to hold Charlotte Dorn liable to them based upon statements made by Dr. Dorn as her alleged agent. It was never represented by Dorn that he was acting as agent for Charlotte. No legal reason is presented why Dr. Dorn could not carry as many accounts with the defendants as they would permit, and he was within his rights when he chose to use the name of his wife Charlotte when he opened his new account in that name. No contractual relations were thus established between Charlotte Dorn and the defendants.

Complaint is made of the exclusion by the court of certain written records alleged to be made by the deceased Charlotte and her deceased husband. These consist of certificates for shares of North American Car "A" stock and alleged copies of deposit slips purporting to indicate deposits by Charlotte Dorn in the bank, and purported duplicates of the income tax returns of Charlotte Dorn for the years 1924 to 1928, inclusive. The copies of the deposit slips offered in evidence were not in the handwriting of Charlotte but were in the handwriting of Dr. Dorn. There is no showing when they were made or that they were true and correct copies. The originals were not produced or accounted for. It is argued that these copies of deposit slips

tend to prove that Charlotte Dorn owned some North American Car stock, but as the deposits were made by Dr. Dorn, who could deposit into the account of his wife any check or money, regardless of from what source it came, they do not prove that Charlotte owned the North American Car stock. The same objections might be made to the duplicates of the income tax returns. It is not shown that they were true and correct copies, they were not in Charlotte Dorn's handwriting, they are not signed by anybody and it is not shown when they were prepared. No photostatic copies nor originals were offered. Moreover, it appears that plaintiff relies, not upon the income tax returns but upon some pencil memorandums in the handwriting of Dr. Dorn which were pinned to the duplicate tax returns. It is pointed out that these memorandums make it quite apparent that the purported income tax returns of Charlotte Dorn did not include any of the dividends credited by defendants in the account carried in her name, nor any profits from the sale of securities in the account. Defendants' brief details a considerable number of such items showing dividends and profits from stock, none of which are included in the income tax returns of Charlotte Dorn.

Plaintiff argues that the fact that defendants sent monthly statements to Charlotte Dorn, with requests made upon her to sign customers' cards, substantiated the claim that the account was hers. As we have seen, defendants' bookkeeping department did not know who was the actual owner of the Charlotte Dorn account, and hence monthly statements were automatically mailed to the persons in whose name the account stood upon the books. As evidence that mailing of these statements was without significance is the fact that these monthly statements addressed to Charlotte Dorn continued to be mailed to her 5 1/2 years after the commencement of this suit. Moreover, three times in each

year of the existence of the Charlotte Dorn account, defendants' bookkeeping department sent to her a statement of the balance shown in this account, with the request that this be confirmed by her "by your signature advising whether correct or incorrect." There was also enclosed a form which she was to sign if the statement of the account was correct. It is very significant that from 1924 to 1929, inclusive, although she was asked to sign 18 such statements, she signed none. When Simpson, a customers' man, pursuant to a request from the bookkeeping department, called on Charlotte Dorn and attempted to obtain a customer's agreement from her so that their records might be completed, she refused to sign the card, saying she saw no reason in the world why she should sign it.

There is no support for plaintiff's claim that if defendants suffered a loss in Dr. Dorn's account it was due entirely to their own negligence. The sudden market crash of October, 1929, was the cause of the loss, and this cannot be ascribed to defendants' negligence.

Plaintiff says that defendants are liable for money had and received to the extent of the value of North American Car stock delivered to them for the sole purpose of reissue of new shares in her name in the reorganization of this company. In September, 1924, before the opening of the account in the name of Charlotte Dorn, Dr. Dorn purchased through defendants, on margin, 600 shares of North American Car stock, which was fully paid for by Dr. Dorn by his personal checks during September and the first part of October. Dorn instructed defendants to transfer 150 shares of this stock into the name of Charlotte Dorn, and the certificates in his name and her name were delivered to him. Subsequently, in 1926, the North American Car Company called in all its outstanding shares, to be exchanged for new stock in the

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company. Dorn delayed in signing the certificates, and Simpson, customers' man for defendants, called upon him and insisted he should endorse the certificates as the time for effecting the transfer had almost expired. Dorn brought the certificates of stock into the room and in Simpson's presence asked his wife to endorse the certificate which stood in her name. She inquired why she should do this, and the doctor explained that as the certificate stood in her name her endorsement was necessary, and he repeated to her the condition of the company incorporating. Simpson testified that she was unwilling to sign the stock certificate; that "she said it was not hers and she couldn't see reason why she should do it, and she did not want to sign anything she did not understand." She finally said that if Dr. Dorn wanted her to sign it she would do so. The certificate was brought back to defendants' office by Dr. Dorn and was credited to Charlotte Dorn's account. It was thereafter exchanged for North American Car stock, which was thereafter sold upon orders of Dr. Dorn.

In plaintiff's complaint there is no reference to the 150 shares of North American Car stock. It was not contended upon the trial that the stock had been obtained by Dorn or defendants improperly or that the proceeds of the sale were improperly credited. One cannot try a case on one theory in the trial court and on another in the court of review. McArthur Bros. Co. v. Whitney, 202 Ill. 527.

There are many cases holding that the fact an account is carried in the name of a certain person does not of itself establish a contractual relationship between the parties. In Telford V. Patton, 144 Ill. 611, 627, the court took notice of the well known practice of persons depositing money in banks to

company. Some of the most important of these are the following: (1) the fact that the company should ensure the certificate is not lost; (2) the fact that the company should ensure the certificate is not stolen; (3) the fact that the company should ensure the certificate is not damaged; (4) the fact that the company should ensure the certificate is not forged; (5) the fact that the company should ensure the certificate is not counterfeited; (6) the fact that the company should ensure the certificate is not altered; (7) the fact that the company should ensure the certificate is not destroyed; (8) the fact that the company should ensure the certificate is not used for any purpose other than that for which it was issued; (9) the fact that the company should ensure the certificate is not used for any purpose other than that for which it was issued; (10) the fact that the company should ensure the certificate is not used for any purpose other than that for which it was issued.

the credit of real or fictitious persons, with no intention of divesting themselves of ownership.

The points presented to the trial court were questions of fact. Under such circumstances it has been held that the trial court has the same opportunity as a jury to pass upon the facts, and its findings will not be disturbed unless clearly and manifestly against the weight of the evidence. City of Quincy v. Kemper, 304 Ill. 303; Marble v. Marble, 304 Ill. 229. The evidence that the account in Charlotte Dorn's name was in fact her account was not convincing, while the evidence offered by the defendants that the account belonged to Dr. Dorn is uncontradicted.

Under the circumstances the judgment should be affirmed.

AFFIRMED.

Matchett, and O'Connor, J. concur.

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41762

GEORGE L. SPARBERG,
Appellee,

v.

ISADORE COHEN, JACK COHEN,
PHILLIP COHEN, HERBERT COHEN,
and MORT FISHER, individually
and as co-partners, d/b/a
B. COHEN & SONS,
Appellants.

APPEAL FROM

MUNICIPAL COURT OF CHICAGO.

313 I.A. 143¹

MR. PRESIDING JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

This is an appeal by the co-partners of B. Cohen & Sons from a judgment against them of \$7,555.15, entered upon the verdict of a jury, upon a trial wherein plaintiff sought to recover on two promissory notes executed by these defendants, by Julius Cohen, payable to the order of B. Colitz, who endorsed them and, as plaintiff alleges, delivered them to him for value received. Colitz was also a defendant, but he does not appeal from the judgment.

The defendants asserted that the notes sued upon were accommodation paper, executed at the request of B. Colitz, who was afterwards adjudicated a bankrupt. They denied that plaintiff paid anything for the notes and that he was an innocent holder for value before maturity, and alleged that his possession of the notes was the result of some arrangement with Colitz and was not in good faith. Defendants also assert that plaintiff at no time made demand for payment of these notes of the defendants until within a week prior to the expiration of the 10 year statute of limitations, when this suit was brought. Defendants further say that on the date of the maturity of each of the notes the defendants by check paid each of them in full, with interest, to the then rightful owner.

The evidence shows that both the plaintiff and defendants

are engaged in the waste material business and had known each other for a considerable time before the transactions here involved; Ben. Colitz was at one time wealthy: vice-president of the Superior Bank, and for a long time his credit was good; he was well acquainted with all the members of the defendant firm and was a brother-in-law of one of them - Mort Fisher; Colitz had extensive business deals with the partnership, but all of them were with Julius Cohen, the senior partner, who died in 1933. At one time Colitz had loaned Julius Cohen \$30,000 for the use of the partnership; in 1924 he frequently borrowed money from the partnership, obtaining their notes, signed by Julius Cohen, amounting in the aggregate to approximately \$30,000.

Plaintiff had at one time worked for Colitz in the waste material business, and in 1929 was president of the Michigan Mill Supply Co., dealing in waste paper; he knew the defendants, but only had financial dealings with Julius and Phillip Cohen.

On or about July 1, 1929, Colitz obtained from Julius Cohen two notes, for \$2,500 each; one of these was typewritten at Colitz's office by his stenographer before he brought it to Julius Cohen, and this note bears the typewritten signature of B. Cohen & Sons and was signed by Julius Cohen. The second note of that date for \$2,500 bore the printed signature of B. Cohen & Sons and was drawn in their office; this also was signed by Julius Cohen. Colitz testified that he discounted the note with the printed signature of the defendants with Gumbinsky Brothers, dealing with Nathan Gumbinsky. The other note, with the typewritten signature of the defendant partners, he endorsed and discounted with the plaintiff. Colitz testified that when he brought the note to plaintiff on July 3, 1929, he was indebted to plaintiff for a considerable sum for loans and other moneys;

that this indebtedness was adjusted by receiving from plaintiff a check for the difference between the indebtedness and \$2,500, the face of the note. There was in evidence an entry of this transaction on the Cash Disbursement sheet of the Michigan Mill Supply Co., plaintiff's firm.

September 3, 1929, Colitz obtained from Julius Cohen two other notes, for \$2,000 each; one of these was typewritten by a stenographer in Colitz's office; this bore the typewritten signature of B. Cohen & Sons; he carried this to Julius Cohen, who signed it. The other note for \$2,000 bore the printed signature of B. Cohen & Sons; this was prepared in the office of Cohen & Sons and was there signed by Julius Cohen. The note with the typewritten signature of Cohen & Sons, was discounted with Nathan Gumbinsky. Colitz endorsed the \$2,000 note bearing the printed signature and delivered it to plaintiff, receiving for it \$300 cash and the check of the Michigan Mill Supply Co. for \$1,700 to the order of Ben. Colitz. The record of this transaction appears on the Cash Disbursement sheet of the Michigan Mill Supply Co.

The two checks which were drawn by the Michigan Mill Supply Co. to Colitz on July 3, and September 4, 1929, respectively, according to the testimony of plaintiff, were destroyed with other records. Plaintiff testified that he did not keep books long, and the only record of these transactions is in the Cash Disbursement book referred to. He testified that the entries in the book of cash disbursements were made by his bookkeeper, Miss. Goldstein, who was in California at the time of the trial. He testified that the entries showing these transactions of July and September, 1929, were made under his supervision and were true and correct; that the two checks given to Colitz were drawn

on the Merchants National Bank of Battle Creek and cleared through that bank and were deducted from plaintiff's account.

Plaintiff testified that after the notes matured he talked many times with Julius Cohen during his lifetime about the notes, and also to Phillip Cohen. It is argued that the reason for the delay in bringing suit on the notes was that when plaintiff talked to Colitz, shortly after they became due, Colitz asked plaintiff to let the matter rest; that he (Colitz) "had certain matters to straighten out," and, "you don't need the money so bad;" that Colitz had several talks with plaintiff about the notes; that he did not wish to bother Julius Cohen, who had heart trouble; that he requested plaintiff not to press the payment of these notes, saying, "You won't lose a nickel on that and I don't want you to start a law suit; I may get help from my brothers-in-law and the rest of the Cohen family; that is what I hoped." Colitz says he gave plaintiff a diamond ring worth about \$1,000 as security for payment of the notes.

Defendants sought to support their theory of payment of these notes by the testimony of Nathan Gumbin - the same party referred to as Nathan Gumbinsky. He testified that Colitz delivered him the note of defendants for \$2,500, for which he paid Colitz, and that when the note matured he received a check from Cohen & Sons for the amount of the note, which note he returned to Colitz. He also testified to the similar transaction on September 3, 1929, when Colitz brought to his office defendants' note for \$2,000, for which he (Gumbin) gave Colitz a check for that amount. He testified that this note also was paid at maturity by check from the defendants.

Defendants argue earnestly that the notes which Gumbin discounted and which were paid by defendants, are the notes which

plaintiff introduced in evidence as the notes upon which this suit is brought. Gumbin did testify that the notes which he received from Colitz and which were subsequently paid, were the same as those introduced in evidence, marked plaintiff's Exhibits 1 and 2. The jury could properly believe Gumbin's testimony with reference to the two notes and their payment, but he was mistaken in identifying them as the notes introduced in evidence on behalf of plaintiff. It should be borne in mind that Colitz testified that on July 1, 1929, he obtained two notes from Julius Cohen, for \$2,500 each, and later, in September, obtained two other notes for \$2,000 each, and that he discounted one of these for \$2,500 with Gumbinsky Brothers, and, according to his recollection, also discounted a \$2,000 note with Gumbinsky.

Defendants argue that when Gumbin was paid for the two notes in his possession he returned them to Colitz, who turned them over to plaintiff after they had been paid and subsequent to maturity. Colitz denies that he ever had either of the notes (marked plaintiff's Exhibits 1 and 2, respectively,) in his possession or control after he delivered them to plaintiff in July and September. There is no definite denial of the testimony of either plaintiff or Colitz as to the transactions in July and September, 1929, and it is only by inference that their stories are assailed.

There are also other details tending to cast discredit on Gumbin's identification of plaintiff's notes with the notes which he discounted for Colitz and which were afterwards paid by the defendants. To examine all of these items would unduly lengthen this opinion. One item touches the check with which defendants say they paid Gumbin for their note held by him.

This note is for \$2,500 with interest, and yet the check said to pay this does not include interest. Gumbin's explanation of this is uncertain, and he finally testified he did not know whether he received any interest on this note. There were also other discrepancies with reference to the interest. Taking the record as a whole, we cannot say that the verdict of the jury, accepting the testimony of the plaintiff as true, is manifestly against the weight of the evidence.

Defendants' next point is that in their motion for a new trial they presented an affidavit setting up newly discovered evidence which they say was not available to them at the time of the trial. This affidavit sets forth that two notes were signed on July 1, 1929, and two signed in September, 1929. No reason appears why all this documentary evidence could not have been produced by defendants upon the trial. In many details the alleged newly discovered evidence was not in accord with the evidence given upon the trial by defendants. For instance, the book which they offered to produce on their motion for a new trial shows that defendants purchased from Gumbin's company, between the years 1924 to 1936, goods amounting to \$25,000, and other items. This was directly contradictory of testimony on behalf of defendants that the defendant firm had no business with Gumbin's firm in 1928 and 1929.

The trial court was of the opinion that the alleged newly discovered evidence was untrustworthy, and at least subject to suspicion. In McDonald v. People, 123 Ill. App. 346, 363, it was held that under such circumstances a new trial should not be granted. And in Chicago A. R. Co. v. Raidy, 203 Ill. 310, 317, it was said that courts should not allow newly discovered evidence as a basis for a new trial because one party is not

This note is for a \$500 with interest, and it was a check for \$500 to pay this debt not including interest. ... this is uncertain, and he himself admitted that he did not know whether he received any interest on this note. ... other discrepancies with reference to the interest. ... record as a whole, we cannot say that the version of the jury, accepting the testimony of the plaintiff as true, is manifestly against the weight of the evidence.

Defendants' next point is that in their case, in this new trial they presented a different picture of the evidence which they say was not available to them at the time of the trial. This alternative case holds that two notes were signed on July 1, 1939, and two signed in September, 1939. No reason appears why all this documentary evidence could not have been produced by defendants upon the trial. ... the alleged newly discovered evidence was not in accord with the evidence given upon the trial by defendants. ... the book which they offered as evidence on their case for a new trial shows in defendant's handwriting "the number 100,000" between the years 1934 to 1936, ... other items. ... behalf of defendants ... with Gumbel's trial in 1938.

The trial court ... newly discovered evidence ... to suspicion. ... it was ... not be presented. ... evidence as a whole ...

satisfied with the results of the trial and attempts to get facts which will enable him to do better at another trial. For these and other reasons the court properly did not grant a new trial on the ground presented in the affidavit.

It is said the court gave improper instructions to the jury over the objections of the defendants. Neither the record nor the abstract indicates who presented and requested any instructions. Each of them is followed by the word "Given," but there is no way to determine at whose instance they were given. Sullivan v. Ohlhaber Co., 291 Ill. 359. Moreover, defendants made no specific objections to the instructions before the jury retired. Rule 62(3) of the Municipal court provides that objections to instructions must be made before the jury retires and specifically point out the objectionable matters. Paulick v. National Bank of Republic, 279 Ill. App. 160.

It is said that the signing of accommodation paper was foreign to the business of the defendants, but the evidence shows that Colitz and defendants had for many years past had transactions of this sort. Although it is argued in defendants' brief, yet the record shows conclusively that Julius Cohen had authority to sign the two notes held by plaintiff. It was not denied that Julius Cohen had undivided charge of the finances of the defendant firm. He was the oldest member of the family and the senior partner of the firm, and, as we have said, Colitz at one time loaned the partnership a large sum of money, which Julius Cohen reciprocated at a later date.

It was not reversible error to deny the request of the defendants to open and close the argument to the jury. The general rule is that whenever the plaintiff has anything to prove in order to secure a verdict, the right to open and close argument

belongs to him. Liptak v. Security Benefit Assn., 350 Ill. 614. In the present case, in addition to the plea of payment, the defendants insisted on proof of plaintiff's case and cross-examined him with the intention of showing that he was not a holder for value of the notes. They also objected to plaintiff's exhibits which were offered to supplement the proof as to the circumstances under which the notes were given to plaintiff by Colitz. The court committed no error in following the usual procedure for the opening and closing of argument.

The jury were instructed that if they should find for the plaintiff the verdict would be, "We, the jury, find for the plaintiff *** with \$_____ damages." Defendants say that this verdict and judgment were proper as to Colitz but not as to them. The record fails to show any objection in the trial court to the form of the judgment order. Moreover, the entire controversy was between the plaintiff and the firm of B. Cohen & Sons. Colitz made no defense and does not appeal. Under Rule 63 of the Municipal court and § 68 of the Civil Practice Act the form of the verdict returned by a jury is not fixed by any rule of law. In Western Springs Park Dist. v. Lawrence, 343 Ill. 302, it was held that all reasonable intendments will be indulged in support of a verdict and it will not be held insufficient unless, through necessity, there is doubt as to its meaning. Moreover, where relief has been asked against several defendants, a general verdict for plaintiff will be construed as a verdict against all defendants. 64 C. J. 1107, § 912; New York, T. & M. Ry. Co. v. Gallaher, 79 Tex. 685.

The trial court expressed his opinion that substantial justice had been done in this case, and indicated that in his

The first of these is the fact that the
 Institute has been able to obtain

opinion the verdict was right. Under such circumstances a reversal should not be ordered except for grave errors, which, if they had not occurred, would have resulted in a different verdict. Muller v. Equitable Life Assur. Society, 293 Ill. App. 555; Convert v. Bishop & Babcock Co., 152 Ill. App. 516. And in West Chicago St. R. Co. v. Maday, 188 Ill. 308, the court said, "It is more important in the administration of justice that litigation should end in the attainment of substantial justice, than that a record of the proceedings should be built up which is without flaw or blemish."

We find nothing in the record that would justify a reversal, and as it cannot be said the verdict is manifestly against the weight of the evidence, the judgment is affirmed.

AFFIRMED.

Matchett, and O'Connor, J.J., concur.

41802

HENRY WOLTHAUSEN,
Appellee,

v.

HELENE LEDERER, et al.,
Defendants

On Appeal of THE SHURTLEFF
COMPANY, and MERCER LUMBER
COMPANIES,
Appellants.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

312 I.A. 143²

MR. PRESIDING JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

Plaintiff filed his complaint to remove as clouds on his title to real estate, a lease and option to purchase in favor of defendant Helene Lederer, and also certain mechanics' lien claims; answers and claims were filed and the cause was referred to a master, who filed his report recommending that plaintiff's prayer as to Helene Lederer be granted and that the mechanics' lien claims be allowed. The Shurtleff Company's claim was for \$1,608.14, with interest. The Mercer Lumber Companies' claim was for \$253.11, with interest. The chancellor sustained exceptions to the report as to the claims of The Shurtleff Company and the Mercer Lumber Companies and denied their lien claims, and they appeal.

A brief recital of the facts is called for. Plaintiff is a retired farmer, a cripple and over 70 years of age; he lived within the village limits of Barrington, Illinois; he owned a 12 acre farm within the village limits, about a mile from his residence, which had on it a one-family residence, a barn and two garages. Defendant Helene Lederer is a real estate broker, and on April 19, 1937, she obtained a lease from plaintiff for the farm and buildings at a rental of \$30 a month for one year, and

11802

NEW YORK, N.Y.,
April 1, 1941

Mr. J. Edgar Hoover,
Washington, D.C.

On April 1, 1941,
COMM. on the Judiciary,
U.S. Senate,
Washington, D.C.

Dear Mr. Hoover:

Reference is made to your letter of March 28, 1941, in which you advised that the Committee on the Judiciary of the United States Senate has received information from a source reliable and confidential that a certain individual, who is known to the Committee as "X", has been in contact with certain individuals in the United States who are known to the Committee as "Y" and "Z". The Committee is deeply concerned by this information and is endeavoring to determine the identity of "X" and the nature of the contact with "Y" and "Z". The Committee is also endeavoring to determine the nature of the information received from the source and the reliability of the source.

Very respectfully,
J. Edgar Hoover

Enclosed for the Committee are two copies of a letterhead memorandum dated and captioned as above, which contains a summary of the information received from the source and the Committee's analysis of the information. The Committee is also enclosing for the Committee a copy of a letterhead memorandum dated and captioned as above, which contains a summary of the information received from the source and the Committee's analysis of the information. The Committee is also enclosing for the Committee a copy of a letterhead memorandum dated and captioned as above, which contains a summary of the information received from the source and the Committee's analysis of the information.

took possession. The lease contains the usual clause that she has received the premises in good order and repair, and upon the termination of the lease will yield them up to the lessor in good condition and repair, ordinary wear excepted. The lease contains no permission to build, remodel or otherwise change the premises.

May 25, 1937, she had an option from the plaintiff to buy the premises on or before April 30, 1938 for \$8,000. This option contained no clauses permitting the premises to be changed or remodeled.

Shortly thereafter she began to reconstruct the house on the farm by converting it from a single family into a two-family dwelling. For this purpose she bought lumber from The Shurtleff Company, who made their first delivery July 2, 1937, and also from the Mercer Lumber Companies, who commenced to deliver in March, 1938. Plaintiff testified that he knew nothing about these proposed changes until about the middle of August, 1937 when he visited the premises.

There was in existence in the Village of Barrington at this time an ordinance forbidding any person from erecting, altering or repairing any building in the village without first obtaining a permit so to do from the Building Commissioner of the village. It is conceded that no permit was obtained to make the alterations in the building.

There was also in existence in the village a zoning ordinance which provided that no buildings should be erected, altered or used, in the district in which the building in question was located, except for "Single Family Dwellings." This ordinance contained a provision that no building should be altered until the Building Commissioner issues a certificate that the proposed

altered building complies with the building ordinances, and no permit to alter or change a building shall be issued to make a change which is not in conformity with the provisions of the zoning ordinance.

Plaintiff argues that the violation of this ordinance forfeited the lumber companies' right to a claim for benefits under the Mechanics' Lien statute, and this was the opinion of the chancellor, as shown by the record. The chancellor cited in support of his opinion, Bairstow v. Northwestern University, 287 Ill. App. 424, where the right to a mechanic's lien was denied, as the work to be done was in violation of the zoning ordinances and the Evanston building code.

Defendants argue that the ordinance does not apply to those furnishing materials, but only to workmen erecting or altering the structure. The point is not well taken. The erection, alteration or construction of any structure implies the use of materials. To erect or alter a building without materials is, obviously, impossible. It follows, therefore, that the furnishing of materials to be used in a building is included in the conditions named in the zoning ordinance.

We hold that the lumber companies were not excused from inquiring into the use to be made of the materials furnished by them, and whether its use was a valid and legal one. Manager of The Shurtleff Company, Paulson, testified that Helene Lederer came into their office and ordered some lumber to use on the Wolthausen place, saying she had bought the property. No inquiries were made of plaintiff as to whether it was proper to deliver this lumber, nor as to the use to be made of it. Paulson also advised with Helene Lederer and assisted in the selection of materials for the remodeling job. He also saw the job as it progressed.

altered building complies with the will of the public, and
permits to alter or change a building shall be made in accordance
with the provisions of the ordinance which is not in conformity with the
existing ordinance.

Plaintiff argues that the violation of the ordinance
forfeited the lumber contract, and that the ordinance is
under the mechanics' lien statute, and that the ordinance is
the ordinance, as shown by the record. The ordinance is
in support of the ordinance, Building & Lumber Contract,
387 Ill. App. 434, where the ordinance is
denied, as the work to be done was in violation of the ordinance,
ordinance and the Building Contract.

Defendant argues that the ordinance is not a lien
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the conditions named in the existing ordinance.

It is held that the lumber contract is not a lien
including into it a lien in the case of the building contract
then, and that the use was a valid and legal one.
of the Building Contract, Building & Lumber Contract, and the
case into their office and ordered some lumber to be
Building Contract, and the Building Contract, and the Building
and was made a plaintiff as to whether it was a lien or not.
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also giving it to the Building Contract, and the Building
of materials for the remodeling job. He also was the job.

The same things are true with reference to the Mercer companies. They made no inquiry as to the use to be made of the materials. The alterations and construction of the building in question was in violation of the ordinance which does not permit the construction of a two-family dwelling in this district. The lumber companies are charged with knowledge of the existence of this ordinance and it is a fair inference that they knew the alteration of the building violated the ordinance. They cannot assert a claim to a lien based upon its violation. As was said in Brown & Co. v. Owens, 248 Ill. App. (abst.) 661: "It is a well established principle of law that a contract, which, by its terms, violates a statute or a city ordinance, is not enforceable; and courts of law will not relieve where the parties are undertaking by contract to do something expressly prohibited either by statute or ordinance." And in Western Cold Storage Co. v. Estate of Kaufman, 204 Ill. App. 477, it was said that "There can be no enforceable contract, either express or implied, which by its terms violates a statute or city ordinance." In Ellison v. Adams Express Co., 245 Ill. 410, it was held that courts of justice will not assist parties "who have participated" in any transaction forbidden by statute, and that "The law will not lend its aid to enforce a demand having its origin in a breach of the law itself." It has been held in many cases that there is no enforceable contract which violates a city ordinance. Western Cold Storage Co. case, supra; Tananevich v. Lamczyk, 134 Ill. App. 135; Goodrich v. Tenney, 144 Ill. 422.

Construing the language of the zoning ordinance in question as applying to those furnishing materials as well as to others, the conclusion is obvious that by participating in the illegal attempt to violate the ordinance the materialmen furnish-

The first thing I noticed when I stepped out of the car was the cold, crisp air. It was a relief after the warm, stuffy interior. I looked around, trying to get my bearings. The street was quiet, with only a few cars visible in the distance. The buildings on either side of the road were old and weathered, their facades showing signs of age and neglect. I walked slowly, my footsteps echoing on the pavement. The air smelled of dust and old stone. I felt a sense of unease, as if I had entered a new world, one that was both familiar and strange. The silence was oppressive, and I could hear the faint hum of traffic in the distance. I tried to focus on the present, on the feel of the ground beneath my feet. But my mind kept wandering, back to the events of the previous day. I remembered the way the car had felt, the way the driver had looked at me. I shook my head, trying to dispel the thoughts. I needed to find a way out of this place, to get back to where I belonged. I looked at my watch, noting the time. It was late in the afternoon, and the sun was beginning to set. I decided to keep walking, to see where the road would take me. The street curved to the right, and I followed the bend. The buildings grew closer, their shadows cast long and dark on the pavement. I felt a sudden urge to turn back, to go home. But I knew that if I did, I would only find more questions. I pushed forward, my heart pounding in my chest. The road ended in a dead end, a small square surrounded by tall, dark buildings. I stood there, looking up at the sky. The stars were beginning to appear, and I felt a sense of peace. I had found my way out, at least for now. I turned and walked back the way I came, my steps lighter than before. The air was still cold, but it felt like a blanket. I was home.

ing lumber for this purpose cannot enforce their right to a lien.

Defendants contend that the plaintiff had knowledge that Helene Lederer intended to alter the building in violation of the village ordinances. The evidence does not support this claim. As we have seen, he testified that the first he knew of the alterations was about the middle of August, 1937, at which time the alterations were almost completed.

In certain cases lien claims have been allowed on the ground that the property has been benefited by the changes, and that the owner, in equity, should not be relieved of the liability of paying for such changes. Colp v. First Baptist Church, 341 Ill. 73. In the instant case the contrary is the fact, as both the master and the chancellor have found that the premises were damaged to the extent of \$1,000, which would be the cost of restoring the house to a single-family dwelling so that plaintiff will be relieved of prosecution under the zoning laws.

The general equities of this case are with the plaintiff. Lederer gets possession of plaintiff's property under a short term lease; she procures an option to purchase, for which she pays nothing; she proceeds, without the knowledge of the owner, to alter the building, in violation of the village ordinances; she defaults in her contract to purchase and leaves plaintiff in possession of a building which will cost him a substantial sum of money to restore to its original legal status.

The material men should look for payment to Helene Lederer, who ordered the lumber, and not to a lien on the owners property.

The decree worked justice, and for the reasons indicated, is affirmed.

AFFIRMED.

Mr. Justice O'Connor, concurs.
Mr. Justice Matchett, dissents.

40863

JAMES BROWN, a minor by HERMAN E. BROWN, his father and next friend,
Appellee,

v.

JAMES MURRAY and HARRY SMITH,
Appellants.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

313 I.A. 144

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

On July 31, 1935, plaintiff (then a child between six and seven years of age) was severely injured by a truck owned by defendant Murray and driven by defendant Smith. He sued for damages by his father, as next friend. There was trial by a jury, verdict for plaintiff for \$1500, motion for a new trial overruled, and judgment on the verdict. Defendants appeal contending there was no negligence, that an instruction in defendants' favor requested at the close of the evidence should have been given, and that the verdict returned is against the manifest weight of the evidence.

The home of plaintiff and his family was at 1317 Massasoit Avenue in Chicago. St. Angelas School was situated at the northwest corner of Potomac Avenue and Massosoit Avenue opposite his home. Plaintiff attended the school. It was conducted for children of the primary and up to the eighth grade. A. J. Keenan was the janitor and engineer and took care of the school grounds on which there were located two buildings - the main school building and a portable building. To the east was a play yard open for the use of all the children. There were no written rules or regulations with reference to the use of it. The playground was used when school was in session and also during vacation.

Defendant Murray owned the truck and employed defendant Harry Smith as the driver of it. A colored helper named Ewing

40863

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U. S. DEPT. OF COMMERCE, BUREAU OF MARITIME SERVICE

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1. Датум : 18.05.2018

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was employed by the Catholic Salvage Bureau. He went along with the truck which was driven to the school grounds for the purpose of gathering up waste paper, rags, etc. which might have accumulated there. Sometimes people of the parish would bring such material to the school for distribution.

The truck was the average type of commercial truck. The body was 12 feet long, 6 feet high and 6 feet wide. It had a partial panel and a box tarpaulin cover. The entire length of the truck was about 20 feet. It had pneumatic tires and the usual equipment. The cab of the truck had a door on each side with a window in it. The glass part of the door could be rolled down to give air to the driver. There was also a window back of where the driver sat so (if he did not have a full load) he could look and see where he was going in case he backed up. The truck was equipped with a standard rear view mirror, which was outside the cab part of the truck. At a glance the driver could see what was behind him. The mirror was to the left of the driver and in good working order. The truck was equipped with the standard type of horn.

About noon of the day in question the truck approached the school yard from the west. Plaintiff was sitting in front of his home across the street with his brother David, (who was a year older) and several other boys - Edward Alary, George Lahey, James Curran, Bernard Logan and Albert Morgan. Just before the truck turned into the school yard these boys got on the tail end of it and appropriated it to their own use. The truck was driven into the yard, then toward the portable building from the door of which the material it carried away was usually received. The driver came into the yard facing east and then made a U-turn. At this time he was close to the portable building and on the

material to the school for distribution. I stated there, sometimes people in the school would bring down of gathering up waste paper, etc., which might have come from the truck which was driven to the school for the purpose of being employed by the Catholic Charities Agency. We had been

The truck was the average type of commercial truck. The body was 11 feet long, 8 feet high and had a partial panel and a box top. The truck was about 30 feet. It had pneumatic tires and dual equipment. The cab of the truck had a door on each side with a window in it. The whole part of the door would be rolled down to give up to the driver. There was a window back of where the driver sat. (If he did not have a full load) he could look out and see where he was going as he backed up. The truck was equipped with a standard rear view mirror, which was outside the cab part of the truck. It also had the driver could see what was behind him. The driver was in the front of the driver and in good working order. The truck was equipped with the standard type of horn.

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north side of it. He says that at no time did he know that there was anybody on the truck. The truck stopped and just before it stopped all these boys except the plaintiff got off. Plaintiff followed and either at the time he was getting off or just after he was off, the truck backed up and struck him, causing the injuries for which he sues.

These injuries were serious. He was taken to St. Anne's Hospital.

Plaintiff says that the driver told the boys to get off. His brother David testifies to the same effect. The defendants contend that this is the crucial point in the case; that from this evidence only would the jury be able to find that the driver knew of the presence of plaintiff and the other boys on the truck. Defendant says it is apparent from all the evidence that the case was sent to the jury only because it was possible to infer from the testimony that if the driver told the boys to get off the truck he must have known they were on it. It is said that if the driver of the truck did not know the boys were on it, and if there was no one else in the yard to watch out for, no negligence could be attributed to the driver in backing up his truck. Defendants say: "Hence the only possible theory, if theory there is, on which the plaintiff could hope to make a case, would be that the driver because of his yelling, knew that the boys were on the truck".

Defendants then argues that the testimony of these children of tender age (so tender that they could not be charged with contributory negligence) was not entitled to the same weight as that of adults and could not be believed against the testimony of all other witnesses whose evidence it is said was to the contrary. Defendants cites C. B. & Q. R. R. v. Stump, 69 Ill.

11308

411. This is not, we think, a fair statement of the case. While the other boys do not corroborate the evidence of plaintiff to the effect that the driver told him to get off, they and other witnesses give evidence from which the jury had a right to believe the driver of the truck was not unaware of the presence of these boys. Practically all the evidence is to the effect that while the boys were riding on the truck they were laughing and yelling so loud as to be heard across the street. It is reasonable to believe therefore the driver, too, must have heard them. Four of the boys at the time the truck stopped in the school yard were running from the rear end of the truck and some of these were in the direct vision of the driver looking back from his seat. The evidence also is to the effect that just after the four boys jumped off and before plaintiff reached the ground the boys were yelling to plaintiff to get off. The windows of the cab door, it is reasonable to believe, were open. The weather was fair. We think the jury might reasonably believe the driver heard these calls to the boy. Moreover, Keenan, the janitor, a witness for defendants said that he saw plaintiff getting off the truck and called out to him to stay there. This was within the hearing of the driver. We hold, it was a question for the jury whether the driver, in the exercise of due care, knew or ought to have known that there were children at the rear of his truck who would be endangered through backing it up. The plaintiff was of tender years. As a matter of law, he could not be held guilty of contributory negligence. Maskaliunas v. C. & W. I. R. R. Co., 318 Ill. 142. There was evidence from which the jury could reasonably find the defendants negligent. We hold the case was properly submitted to the jury.

Defendants contend (citing a large number of cases)

plaintiff was a trespasser on defendants' truck and that defendants owed no duty to him other than that they should not wilfully and wantonly injure him. The cases cited are too numerous to review but all easily distinguishable. Whether plaintiff was a trespasser or not he was certainly no longer a trespasser after he reached the ground, where the evidence tends to show he was injured. Cases cited (such as Margolis v. Bremner Bros., 218 Ill. App. 304,) are not applicable. The question of whether plaintiff at the time he was injured was a trespasser was for the jury.

The case was rightfully submitted to the jury, the verdict is not manifestly against the preponderance of the evidence; and the judgment will be affirmed.

AFFIRMED.

McSurely, P. J., and O'Connor, J., concur.

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41743

IRA ORBAN,

Appellee,

v.

CITY OF CHICAGO,

Appellant.

APPEAL FROM CIRCUIT COURT, COOK COUNTY.

313 I.A. 144²

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

In an action to recover damages for personal injuries upon trial by jury there was a verdict for plaintiff in the sum of \$3,250 with judgment after motions for a new trial and in arrest had been overruled. Defendant appeals.

The negligence alleged was that the City with constructive notice permitted a sidewalk to become and be in a dangerous condition, whereby plaintiff fell and was injured. The defendant contends for reversal that it was not guilty of negligence in maintaining the sidewalk and that the evidence does not disclose plaintiff at the time she received her injuries was in the exercise of due care.

The accident in which plaintiff was injured occurred on the evening of March 19, 1937, about 7 o'clock P.M. Plaintiff lived at 2415 South Albany Avenue in Chicago, a street running north and south. Her daughter-in-law, Stella Wallace, lived at No. 2309 on the same side of the same street. Plaintiff's home was one block south of the home of her daughter-in-law. On this particular evening plaintiff and Stella Wallace left the home of the latter and walked south toward the home of plaintiff. Plaintiff walked on the left side of Mrs. Wallace and on the east sidewalk side of the street. She walked close to the building line. The parties were about a foot apart, the daughter-in-law walking on the side next the parkway. Many times before this

plaintiff had walked over this same sidewalk. She walked over it about twice a week. Mrs. Wallace, too, was familiar with the sidewalk, having passed over it many times.

There is some conflict in the evidence as to whether the street lights in that block were on the east side of the street. At any rate, the evidence shows it was dark at the time in question.

In the sidewalk in front of No. 2347 there was a difference of level in the adjoining slabs of concrete. This difference in level started on the sidewalk near the building line and grew larger gradually toward the curb. The witnesses did not agree as to the depth of the depression in the sidewalk. One witness said one of the slabs was three inches higher than the other; he said he didn't measure it, it might have been an inch and it might have been less. Another witness said it was about "three or four inches" at the extreme part of the rise and about an inch near to the building line. The higher slab was broken at the corner near the fence. Photographs showing the condition of the sidewalk are in evidence and give a better idea of its condition than the testimony of the witnesses. This defective condition of the sidewalk had existed for six or seven years.

Plaintiff stumbled over this depression, fell on her left arm and broke it. Her daughter-in-law and a Mr. Koscielniak picked her up and took her to her home. From there she was taken to the County Hospital where she stayed five days, and was later treated for about two months making weekly visits to the hospital. She sustained a fracture of the ulna bone in her left arm, and the evidence shows without dispute has sustained permanent injury. There has been a shrinkage or atrophy of the muscles of the forearm.

plaintiff had walked over the bridge, and the jury
it about twice a week. The jury found that the
the plaintiff, having been in the bridge
there is no doubt in the evidence as to the fact
the street lights in that place were not on at the
street. At that time, the defendant was on the bridge
in question.
In the plaintiff's case, the jury found that the
ence of level in the plaintiff's case of complaint. This is
in level of the bridge, and the plaintiff's case is
larger gradually toward the south. The jury found that
as to the level of the bridge, the plaintiff's case is
said one of the bridge is lower than the other. The jury
he said the bridge is lower, and the plaintiff's case is
might have been lower. The jury found that the bridge
on both sides of the bridge, and the plaintiff's case is
near to the plaintiff's case. The jury found that the
corner near the bridge. The jury found that the
evidence in the plaintiff's case is lower than the
than the testimony of the witness. The jury found that
of the bridge is lower than the plaintiff's case.
The jury found that the bridge is lower than the
left side and right side. The jury found that the
right side up and the left side down. The jury found
to the County Board. The jury found that the
proceed for the bridge. The jury found that the
The evidence of the plaintiff's case is lower than
the evidence of the defendant's case. The jury found
There has been a difference of opinion as to the
evidence.

Plaintiff at the time of the trial was 57 years of age. Defendant contends it should have been held by the court, as a matter of law, defendant was not guilty of negligence and that a requested instruction to that effect should have been given. In considering this contention plaintiff is entitled to have the evidence with all its just inferences taken in the light most favorable to her. When so considered, we hold the jury might reasonably find the sidewalk was defective and that defendant had constructive notice thereof and was negligent, while plaintiff at and before the time of her injury was in the exercise of due care. The photographs in evidence show that the defect in the sidewalk was substantial not merely a slight difference in the level of adjoining slabs of concrete, as defendant contends. Any attempt to review the cases (about 60 in number) which are cited in the briefs would require much labor without increasing materially the sum total of judicial knowledge. Graham v. City of Chicago, 346 Ill. 638, cited by defendant, decides the liability of a city for causing the accumulation of artificial ice on its sidewalks. White v. City of Belleville, 284 Ill. App. 322, is a case where the facts were quite similar to those in this case and the decision quite favorable to defendant's view. The Appellate Court was, however, reversed by the Supreme Court in White v. City of Belleville, 364 Ill. 577. The cause was remanded to the Appellate Court with directions to pass on other errors. The Appellate Court then affirmed the judgment, 290 Ill. App. 616. The difficulty in harmonizing cases of this character is described in the opinion of this court in Puck v. City of Chicago, 281 Ill. App. 6. Upon the whole record we hold this case was for the jury and the verdict was not against the manifest weight of the evidence and the judgment will be affirmed.

AFFIRMED.

McSurely, P. J., and O'Connor, J., concur.

41773

P. H. BILLETER,
Appellee,

v.

HALSAM PRODUCTS COMPANY,
Appellant.

APPEAL FROM

MUNICIPAL COURT, OF CHICAGO.

313 I.A. 145

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

In an action for damages for breach of contract, on trial by the court there was a finding for plaintiff in the sum of \$2,337.50. Defendant appeals.

Plaintiff is in the business of selling bagged, bailed and bulk sawdust and shavings. Defendant manufactures checkers and dominoes. July 1, 1937, they entered into a written agreement by which in substance plaintiff agreed for a period of two years to remove all shavings and sawdust from defendant's plant. For the first year of the period defendant agreed to pay plaintiff compensation in the sum of \$40.00 per month in addition to the sawdust, etc. For the second year plaintiff agreed to perform these services without further or other compensation.

Plaintiff at once began work under the terms of the contract. March 23, 1938, defendant wrote plaintiff in substance that the demand for shavings and sawdust had increased very much; that it had two offers to buy its supply of shavings and sawdust at \$1.00 to \$2.00 per load. Defendant said: "Today you are not only getting this \$40.00 a month from us to haul the shavings out, but no doubt are getting quite substantial prices from your customers for the shavings. The combination of the two, therefore, has no doubt paid for your equipment much sooner than you expected. We realize, Mr. Billeter, that you did take care of us last summer when it was almost impossible to get rid of the shavings. However, conditions are so entirely different now than

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1. The first part of the document is a letter from the author to the editor, dated 1968. It discusses the author's interest in the topic of the book and the editor's response.

MR. T. J. O'NEILL

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● 1997年11月1日起，凡在境内销售货物或提供应税劳务的纳税人，均应按销售额的一定比例向购买方开具专用发票。

they were then that we believe some change in the contract should be submitted by you".

A conversation between plaintiff and Mr. Goss of the defendant company followed in which plaintiff declined to change the contract.

August 8, 1938, defendant again wrote: "We regret to advise that we find it necessary to discontinue the agreement made with you as of July 1, 1937, to haul our shavings and sawdust away". The action of defendant was said to have been caused by the fact that there had been a forced shutting down of the woodworking department "due to the fact that the 'cyclone' was entirely filled up which caused the shavings to fly all over the neighborhood before same was noticed". The letter went on to say that neighbors had complained and the Health Department representative called and warned not to let this happen again. The letter stated arrangements had been made for other service starting the next day.

It is admitted the "cyclone" overflowed and sawdust floated about the neighborhood, but there is a dispute as to who was at fault. Plaintiff says Mr. Goss told him when he first made the contract that defendant produced only two or three loads a day; that usually defendant had someone watching the bin and would call plaintiff up if his truck did not happen to get there when the bin was full. This had been the practice up to March 23, 1938. After that date defendant did not call up plaintiff in such circumstances.

After the letter of August 8, a conference followed at which the union agent, Mr. Goss, Mr. Margraf and plaintiff were present. The result of the conference is expressed in a letter of defendant to plaintiff, dated August 12, 1938. In substance

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it is to the effect that it had been unanimously agreed plaintiff should continue to haul away the shavings and sawdust "as per agreement made with you as of July 1, 1937, with the exception that Charles Margraf is to receive 50% of the white pine shavings produced by us----he to do his own hauling as instructed to do so by you." The letter goes on to state that if through no fault of defendant "you fail to live up to your part of the contract to the extent that our Woodworking Department is shut down due to the blower system being plugged up, we will have the right to cancel said contract".

Plaintiff continued to haul under this modified agreement until August 22. Plaintiff testifies that a few days after August 12, Mr. Goss called him up and asked if he couldn't get some other supply to take the place of defendant's mill; that again (a few days thereafter) plaintiff called Goss and told him he had an opportunity to bid in on a mill that would produce as much as defendant's, that he would go ahead with the negotiations and if successful would release defendant from the contract. He also says he told Goss it might be advisable for him to get in touch with Mr. Margraf to see if Margraf was willing to take the entire output of defendant. Goss called back and said Margraf would do this, and plaintiff said he would see what he could do with his new contract and advise. The new contract, however, which was being negotiated between plaintiff and the St. Joseph Lumber Company, was not consummated. Plaintiff notified Mr. Goss to this effect, but Goss stated that he had already notified Margraf to go ahead.

On September 1, 1938, attorneys for plaintiff wrote defendant notifying it plaintiff was ready to continue to perform the services required by the contract of July 1, 1937, as modified

by the agreement set forth in the letter of August 12, 1938, and that demand was made he be allowed to continue such services until the end of the contract. Further that in default of this defendant would be held responsible for damages.

On September 7, defendant wrote plaintiff: "Pursuant to our telephone conversation yesterday afternoon, it is our understanding now that you could pay us something for our white shavings. In order to be in a better position to make a definite decision in the matter, wish you would submit your proposal in writing. Upon receipt of same, we will go into the matter again".

Defendant argues first the contract was abandoned by plaintiff and acquiesced in by defendant: that the contract will, therefore, be deemed to have been abandoned by both.

Secondly plaintiff is precluded from recovering because it was he who first breached the contract. To the first proposition defendant cites Harrison v. Polar Star Lodge No. 652, 116 Ill. 279; Lasher v. Loeffler, 190 Ill. 150; and Hayes v. Carey, 287 Ill. 274. To the second it cites Myers v. Tillson, 149 Ill. App. 628; Reskie, Kirshbaum & Co. v. Walzer, 213 Ill. App. 305; Consumers Mutual Oil Co. v. Western Petroleum Co., 216 Ill. App. 382, and similar cases. Both propositions of law may be conceded to be accurate in a case where the facts are such as to make them applicable. Defendant's arguments on these points disregard the contention of the plaintiff (well established) that where a case is tried by the court without a jury the findings of the court as to the facts have the same weight as the verdict of a jury upon review by this court. Many cases so hold. We cite only Alton Banking & Trust Co. v. Alton Bldg. & Loan Ass'n., 289 Ill. App. 177. Defendant cannot prevail as to these points on this record because we must assume as a matter of fact, under the

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findings of the court, the parties did not abandon the contract and that plaintiff was not first guilty of a breach of it.

Defendant next contends the court erred in allowing plaintiff to testify as to the number of bails, bags and loads of sawdust, etc., he received from defendant without producing specific records which would be the best evidence. Defendant, we think, misapprehends the record on this point. Upon his direct examination plaintiff testified he had kept no record of these particular matters for the reason he did not pay for the material. In his bookkeeping he simply kept records of sales and costs. On cross-examination he was asked if he kept any books, who kept them and where the books were. He replied that he did keep books, that they were kept by his wife and were in the hands of attorneys for the reorganized company known as the A. A. A. Sawdust and Shavings Company. He did not know exactly where. We understand from this evidence not that there were no books showing the business transacted by the plaintiff but that there were no books which would show the particular transactions as to the numbers of loads, etc., which at different times plaintiff received from defendant's plant. If defendant desired to show there were books kept in the course of plaintiff's business, which would contradict plaintiff's testimony, the process of the court was available to compel the production of such books. Counsel for defendant asked no specific questions as to records of particular transactions and (it is suggested by plaintiff) was careful not to do so. At any rate, we hold there is no reversible error in this respect.

Defendant also contends that the damages allowed were merely prospective profits (speculative and uncertain) which under the law a suitor is not allowed to recover. Among other

cases defendant cites National Candy Co. v. Nichols Candy Co., 155 Ill. App. 44; M. Hommel Wine Co. v. Netter, 197 Ill. App. 382, and Salaban v. East St. Louis and Interurban Water Co., 284 Ill. App. 358. The National Candy Company case is annotated in 88 A. L. R. 1471. The annotation discloses there has been some conflict in the opinions of the Appellate Courts of this state as to the rule applicable in such cases. The rule now controlling was announced by the Supreme Court in the case of Barnett v. Caldwell Furniture Co., 277 Ill. 286. In that case the court said: (p. 289)

"A recovery may be had for prospective profits when there are any criteria by which the probable profits can be estimated with reasonable certainty. **** It is perhaps true that absolute certainty as to the amount of loss or damage in such cases is unattainable, but that is not required to justify a recovery. All the law requires is that it be approximated by competent proof. That proof of the exact amount of loss is impossible will not justify refusing compensation. If that were the law, contracts of the kind here involved could be violated with impunity. All the law requires in cases of this character is that the evidence shall with a fair degree of probability tend to establish a basis for the assessment of damages."

In Crichfield v. Julia, 147 Fed. 65, the opinion states that the rule against the recovery of uncertain damages has been generally directed against uncertainty as to cause rather than uncertainty as to measure or extent, and that uncertainty as to cause will usually prevent recovery, whereas uncertainty as to measure or extent does not. See also Black Diamond Fuel Co. v. The Illinois Phosphate Co., 219 Ill. App. 150, and Dahlin v. The Maytag Co., 238 Ill. App. 85.

The defendant in its reply brief undertakes to distinguish this from the Barnett case on the facts. It says that the con-

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BOYD SCOTT: 11300 14th St. N.E. Seattle, Wash. 98105

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tract there was an employment contract; that there is in fact no basis or criteria in this case on which to assess damages. The gist of the holding in the Barnett case was that prospective profits might be recovered in any case where there was criteria by which such profits could be estimated with reasonable certainty. We hold there was such evidence in this case. The contract of plaintiff, as a matter of fact, was in the nature of an employment contract. Plaintiff was to take care of the entire output of defendant's plant. This precise job was turned over to Margraf after plaintiff was wrongfully discharged. There was proof of the amount of material which plaintiff would have received had he been permitted to complete his contract. There was proof of the amount he received the previous year and that plaintiff had customers who would take the material, as defendant well knew. Plaintiff also proved the cost of the sawdust bagged and bailed to him and the price he would have received for it. This was sufficient.

Defendant also urges the proposition (citing authorities) that there was cast upon the plaintiff the duty, in so far as lay in his power, to mitigate the damages which he did not do. It says that while plaintiff was not able to deliver sawdust to customers, he made no effort to obtain another mill as a source of supply, which would have reduced his damages; that he merely sat idly by and watched the so called damages accumulate. Defendant cites Dobbins v. Duquid, 65 Ill. 464; North Packing & Provision Company v. Western Union Telegraph Co., 70 Ill. App. 275; C. R. & I. C. Ry. Co. v. Sprague Electric Co., 280 Ill. 386; and Salaban v. East St. Louis & Interurban Water Co., 284 Ill. App. 358, to the effect that under such circumstances the plaintiff cannot recover to the extent he might have prevented damage or

-8-

injury. Again the facts and the finding of the court thereon are against defendant. The contention cannot be sustained. The whole evidence shows defendant was trying to get out of its contract.

We find no reversible error in the record, and the judgment will be affirmed.

AFFIRMED.

McSurely, P. J., and O'Connor, J., concur.

41798

GEORGE KELCH,
Appellant,

v.

JOSEPH MARX, doing business as
CHICAGO WELDING & BOILER REPAIR
COMPANY, and GEORGE GIEB,
Appellees.

APPEAL FROM

SUPERIOR COURT,

COOK COUNTY.

313 I.A. 146

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

Kelch, plaintiff in the trial court, appeals from a judgment entered on the verdict of a jury directed by the court at the close of plaintiff's evidence in a suit to recover damages for personal injuries. It is argued for reversal the court erred in directing the verdict and entering judgment.

The evidence is not conflicting. September 14, 1939, while plaintiff walked north on Clybourn Avenue, a public highway extending in a northwesterly and southeasterly direction, near No. 2449 on the east side of the street, an automobile owned by Joseph Marx and driven by his employee, George Gieb, struck and severely injured plaintiff. The evidence discloses plaintiff at the time of his injury was in the exercise of due care.

Plaintiff testified that he was walking on the inside of the sidewalk on the building line, opposite a vacant lot; was about half way across the vacant lot when he heard a noise behind him and turning around saw an automobile coming. There were two men in the automobile. It was too late to get out of the way. He was hit by the car owned by Marx and driven by Gieb and knocked into the vacant lot. Plaintiff says the car was right on top of him when he first saw it going north on his side of the street. After he was struck he noticed the car that struck him was facing due south and was clear across the sidewalk. The

GEORGE H. HUGHES,
Agent.

JOSEPH J. HUGHES,
CHIEF OF POLICE,
CHICAGO, ILL.,
Agent.

MR. JUSTICE ALTON T. BROWN

Kelton, Plaintiff in Error, vs. ...

Judgment entered on the verdict of the jury in the case of ...
at the close of the trial the evidence in the case was ...
for personal injuries, ...
in directing the verdict as herein indicated.

The evidence in the case is as follows:

While plaintiff walked south on Myrtle Avenue, a ...
way extending in a southerly direction.

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owned by ...
struck and ...
plaintiff at the time of the injury ...

and

Plaintiff testified that ...

the ...

about half ...

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curb at that place was about a foot high.

Gieb testified (and the testimony is not contradicted) that the accident happened at about 7:45 A.M. He lived at 3711 North Damen Avenue and is a boiler maker. The weather was clear, the streets dry. Marcus Maurer was riding with him. They were going to work on a job at 3734 California Avenue. From their place of business they went northwest on Clybourn Avenue. He was driving between the northbound rails and the east curb. On the opposite side of the street there was a heavy traffic of passenger cars going south along Clybourn Avenue, some on the opposite side of the street car tracks, some in the tracks. He was on the right side of the track and heard a crash. He looked over and saw a car pulled over to the west curb, hit the curb. He was then about even with the car and pulled to the side. The car on the west side of the street turned around rapidly, came across the street and hit the middle of his car, throwing him over on the sidewalk about 4 feet. The Gieb car turned around until it was facing south. The right front of the other car struck the left side of the Gieb car between the rear door and the rear end with its right fender. The car that hit the Gieb car hit the curb over the west side of Clybourn Avenue just in front of a parked car. When the Gieb car stopped no part of it was on the sidewalk. It was in the empty lot and against a building. At the time of the collision Gieb lost control of his car. He went over to plaintiff and found he was hurt. That was the first time he had seen him. The police came. Gieb gave them a statement in substance stating the same facts to which he testified. It was an Oldsmobile car belonging to a Mr. Reuter that struck Gieb's car, in turn causing Gieb to lose control and his car to strike and injure plaintiff.

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... (and ...)
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... They were going ...
... From their place of business ...
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The ground of defendant's motion for an instruction in his favor was that there was no evidence tending to show negligence on his part, and the motion was, we think, properly sustained. Plaintiff cites cases as to presumptions, etc., but these never take the place of proved facts. When evidence is produced contrary to a presumption the presumption disappears. Lohr v. Barkmann Cartage Company, 335 Ill. 335, 340. The evidence here shows that this unfortunate accident was due to a cause entirely beyond the control of defendant Gieb, namely, the presence of a superior force or tortuous act of a stranger tending to bring about the accident. Under such facts no prima facie case was made out. The evidence all showed affirmatively defendant was not guilty of negligence. Chicago City Railway Co. v. Rood, 163 Ill. 477. As a matter of fact, the record shows Reuter, (owner of the automobile which was the real cause of the accident) was sued by plaintiff and settled for \$1,000. The instruction of a verdict in defendant's favor was properly given. The judgment will be affirmed.

AFFIRMED.

McSurely, P. J., and O'Connor, J., concur.

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RALPH H. JACKSON,
Appellee, }

v. }

MEYER KATZMAN, et al.,
Appellants. }

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

3131.A. 146²

MR. JUSTICE O'CONNOR DELIVERED THE OPINION OF THE COURT.

Ralph H. Jackson brought an action against Meyer Katzman, Solomon E. Harrison, Danville Plaza Co., a corporation, Edward Paulson, C. Kildow Lovejoy and Claude A. Lovejoy to recover a commission of \$2,560.50, claimed to have been earned by him as a real estate broker in obtaining a tenant for the hotel in Danville, Illinois. The suit was dismissed as to Paulson and the two Lovejoys, the latter two apparently not having been served with process. There was a hearing before the court without a jury, a finding and judgment in plaintiff's favor for the amount of his claim against Katzman, Harrison and the Danville Plaza Company, and they appeal.

The defense interposed was that defendant Paulson, a broker, procured the tenant for the hotel and that he was paid for his services.

The record discloses that in January, 1939, defendants Katzman and Harrison listed the hotel in Danville with plaintiff, a Chicago real estate broker, for the purpose of obtaining a tenant. There is evidence to the effect that defendants wanted a deposit of \$7,500 for the last six months' rent which was to be \$1,250 a month. Defendants desired a 15 year lease but it was agreed they would consult each other as to the final terms. In case plaintiff secured a tenant he was to be paid a broker's commission, the amount of which was agreed upon. He advertised the hotel for rent and succeeded in getting in touch with defend-

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ant C. Kildow Lovejoy and later with the latter's father, Claude A. Lovejoy. Negotiations were carried on for some time but the parties did not reach any agreement. During the negotiations Katzman and Harrison got in touch with Edward Paulson, another Chicago real estate broker, and submitted the renting of the hotel to him. He also contacted the Lovejoys, as he testified, between April 25 and May 1, of 1939. He told Katzman and Harrison he had a prospective tenant but would not give them his name and afterward an agreement was reached between Katzman and Harrison on one side, and Paulson on the other, as to the terms of the lease. A written lease was prepared dated June 1, 1939, between Katzman and Harrison, as lessors, and Paulson as lessee. The term was for a period of 10 years commencing July 1, 1939 and ending June 30, 1949, at a total rental of \$143,400, payable in monthly installments of \$1,150 for the first 12 months and \$1,200 for the balance of the term. In addition to the rent Paulson was to pay a sum equal to 25% of the gross income derived from the hotel in excess of \$50,000 per year. The lease recites that contemporaneously with the execution of it, \$4,800 was deposited with the lessors as security for the faithful performance by the lessee of the covenants and agreements to be performed on his part, etc. There was a further provision that the lessee might assign the lease or any interest therein "without in each case the consent in writing of the Lessors first had and obtained." The lease further provided: "It is understood and agreed by the parties hereto that upon the assignment of this lease by Edward Paulson and a written acceptance of the assignment by the assignee, the personal liability of Edward Paulson will thereupon cease and determine."

There is a printed assignment attached to the lease dated June 13, 1939, executed by Paulson assigning all his right, title

and C. Wilson, Jr., of the...
A. Lovejoy, of the...
parties...
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and interest in the lease to C. Kildow Lovejoy, an acceptance by the assignee, Lovejoy, executed on the same date, and a consent to the assignment executed by Katzman and Harrison dated June 14, 1939.

Paulson testified that prior to the time the lease was signed by Harrison and Katzman he did not disclose Lovejoy's name as being the tenant he had obtained. On cross-examination he testified, "After Harrison signed that lease, he then asked me, 'Who is my lessee going to be?' And I told him, 'Why do you ask that? I have found the lessee.'" This occurred about 10 to 20 minutes after the lease was signed. "Q. Had Mr. Harrison and Mr. Katzman any time prior to the signing of that lease on Page 10 asked you to disclose who your party was? A. No, with the exception that Mr. Harrison wanted to know if it was a responsible tenant, a man in the hotel business now. I assured him that this tenant would be a responsible party. Q. But he did not ask you his name? A. No, I would not tell him if he did. Q. He did not ask you where he was located in business, or any of his references, or anything like that? A. No. We had an understanding that the tenant's name would not be disclosed to Mr. Harrison and Mr. Katzman." That at the time the witness turned the check over to Katzman and Harrison before they turned the lease over to the witness; "they would have the right and privilege, if the tenant was not satisfactory to them, not to turn the lease over." That Katzman and Harrison would have the right to determine whether they would accept the assignee of the lease before the lease was turned over to Paulson but not afterward.

The evidence is further to the effect that defendants paid Paulson \$2,000 in purchase money notes and not in cash for

his commission while if they had paid plaintiff he would have been entitled to \$2,560.50.

There is a great deal of other evidence in the record as to what the plaintiff Jackson did towards securing Lovejoy as a tenant for the hotel and there is also evidence tending to show what Paulson did in negotiating the deal with Lovejoy, but we think it would serve no purpose to discuss it further for we are of opinion the court was justified in holding that plaintiff was the procuring cause in obtaining the tenant and not Paulson, as the defendants contend.

The judge in deciding the case said: "As in cases of this kind, particularly a close case such as this seemed to be from the Court's point of view, ****. The Court is of the opinion that there was no abandonment by the ultimate purchaser, C. Kildow Lovejoy,***

"The Court was not impressed by the testimony of the Defendant Katzman. Katzman appeared to be unimpressive, evasive, and possessed of a conveniently forgetful memory.

"There is no doubt in the Court's mind that the energy and enthusiasm of the Witness Paulson, contributed much towards collusion on the part of the defendants. Paulson by his high-pressure methods involved the defendants in a transaction with Lovejoy, which was ultimately completed, to the detriment of the Plaintiff Jackson. No criticism is intended of the Defendant Harrison, an attorney, who was evidently swayed by these high-pressure methods instituted and employed by the Witness Paulson, but the Court is of the opinion that collusion took place and that as such defeated and prevented the Plaintiff Jackson from ultimately completing the negotiations with C. Kildow Lovejoy," and found for the plaintiff.

It seems incredible that Katzman and Harrison would

his commission while it was in the hands of the defendant and he
been entitled to \$2,500.00.

There is a great deal of evidence in this case

as to what the plaintiff's position was at the time he was
as a tenant for the hotel and that he was not entitled to
show what position he is negotiating the case with the hotel, but
we think it would serve no purpose to discuss it here as the
are of opinion the court has decided in favor of the plaintiff
was the procuring cause in obtaining the contract for the hotel,
as the defendant contends.

The judge in deciding the case has taken into account of

this kind, particularly a close case and a close question, and
from the Court's point of view, there is no doubt of it.
opinion that there was no agreement by the plaintiff's business,
O. Kilbow Hovey, etc.

"The Court is not impressed by the testimony of the

defendant's witness. Between appeared to be a man of a high
and possessed of a convincing and powerful manner.

"There is no doubt in the Court's mind as to the fact

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but the Court is of the opinion that the collusion in fact, and the
that as such a fact is not a fact, but a mere fiction, and the

ultimately resulting in a verdict in favor of the plaintiff,
and found for the plaintiff.

It seems incredible that the witness should have

agree with Paulson to make a lease to him covering a period of 10 years and prior to the execution of the lease agree that it should be immediately assigned over to a tenant of whom they had never heard.

Counsel for defendants further contend there is no basis in the record on which the judgment against the Danville Plaza Company can be sustained and say that after the Plaza Company was organized it secured a contract to purchase the hotel from Valkenburg & Company from which company Katzman had a lease dated March 11, 1938, the lease having been procured by Paulson; that the Plaza Company operated the hotel not as a lessee but as an operating company, that it had nothing to do with the lease to Lovejoy; that the lease on the property was owned by Katzman and Harrison in their individual capacities and "When they made the deal with Lovejoy through Paulson, it amounted to a subletting of the hotel." That "inasmuch as the Danville Plaza Company was not and could not be party to the lease *** there is no basis on which liability can be imposed on it for the acts of its principal stockholders in their separate and individual capacities."

Katzman, called as an adverse witness under the Statute, testified that he was president and director of the Danville Plaza Company; that Harrison was the secretary; that the directors were Katzman and wife, and Harrison and wife, and it is admitted that Katzman and Harrison are the principal stockholders.

Harrison testified that he had a 50% interest in the hotel company, which was organized April 26, 1938. It was stipulated that Paulson was the "procurer when Katzman and Harrison entered into the contract for the purchase of the Danville Plaza Hotel."

Katzman testified that the \$1,000 initial payment received from Lovejoy or Paulson was deposited to his personal

account and at another time, that it was deposited to the account of the Danville Plaza Company; that he did not know whether the money in payment of the notes of Lovejoy was received by him or by the Danville Plaza Company.

The evidence further shows that the information for an operating statement of the Danville Plaza Company for the years 1937 and 1938 was furnished by Katzman to Jackson.

While the lease (dated June 1, 1939, between Katzman and Harrison as lessors, and Paulson as lessee, hereinbefore referred to) recites: "WHEREAS, the first party [Katzman and Harrison] is the lessee in a certain lease dated the 11th of March, A. D. 1938, wherein Van Valkenburgh & Company, a corporation is the lessor, and is also the vendee in a certain contract for the purchase of the premises, hereinafter described, from the aforesaid Van Valkenburgh & Company," yet in the brief of defendants it is contended that the Danville Plaza Company is the vendee of the property.

Upon a consideration of all the facts we are of opinion the record shows that defendants attempted to cover up who the real owner of the property was. In these circumstances we think the court was justified in entering judgment against the Hotel Company as well as against the other defendants.

The judgment of the Circuit court of Cook county is affirmed.

JUDGMENT AFFIRMED.

McSurely, P. J., and Matchett, J., concur.

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313 I.A. 147¹

Gen. No. 9690.

Agenda No. 4.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
OCTOBER TERM, A. D. 1941.

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ELLEN MCGEE, as Administratrix of the)	
Estate of John McGee, Deceased,)	
)	
Appellant,)	Appeal from
)	Circuit Court,
vs.)	Will County.
)	
EVERETT HENRY,)	
Appellee.)	

WOLFE,-- P. J.

This is an appeal from a judgment on a directed verdict in a suit brought by Ellen McGee as Administratrix of the Estate of John McGee, deceased, against Everett Henry, in which she claimed damages for the death of her husband which was caused by the truck of the defendant striking and killing him. It is claimed by the appellant that the Court erred in directing the jury to find the defendant not guilty, as there was sufficient evidence produced at the trial, that the case should have been submitted to a jury for

Gen. No. _____

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their consideration. This is the only question involved in the appeal.

From an examination of the evidence as abstracted, it appears that the deceased was employed on a W. P. A. project in the Western part of the City of Joliet, Illinois; that around 11:30 p.m. February 9, 1939, he was walking in a westerly direction on Jefferson Street going towards the place where he was employed as a night watchman; that the defendant was driving a truck in a westerly direction on said Jefferson Street, and overtook a car driven by Eugene Tezak and followed it for a short distance, and then attempted to pass the automobile; that he pulled to the left and had his truck nearly across the black line when he noticed some object pass the window of the cab of his truck, and he heard a thud. He immediately stopped his truck and walked back and found that he had injured the deceased, John McGee, who was lying partly on the pavement and partly on the shoulder. It was raining at the time of the accident, but Henry testified that he could see a distance of 100 feet in front of his truck and that his lights were burning.

If there is any evidence in the record that would tend to support the allegation of the complaint, the Court should not have directed a verdict in favor of the defendant. It is insisted by the appellee that the plaintiff failed to show that the deceased, John McGee, was in the exercise of ordinary care for his own safety at the

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time of the accident. The evidence is not disputed that McGee was employed on a W. P. A. project in the westerly part of the City of Joliet; that he was walking in a westerly direction on the south side of the road leading east and west towards the place where he was employed; that he was walking about three or four feet from the south side of the pavement; that the defendant, while driving his truck and attempting to pass the Tezak car, struck and killed the plaintiff intestate. The appellee has cited numerous cases in which it shows the duty of a pedestrian to walk facing the traffic, but has cited no case which shows a man would be guilty of contributory negligence, as a matter of law, if injured while walking in the lane of traffic in which the Statute requires him to walk.

We think that the plaintiff made out a prima facie case which should have been submitted to the jury for their consideration. The judgment of the Trial Court is hereby reversed and the cause remanded.

Judgment reversed and cause remanded.

time of the accident. The evidence is not disputed that McGee was employed on a W. P. A. project in the westerly part of the City of Joliet; that he was walking in a westerly direction on the south side of the road leading east and west towards the place where he was employed; that he was walking about three or four feet from the south side of the pavement; that the defendant, while driving his truck and attempting to pass the Tezak car, struck and killed the plaintiff intestate. The appellee has cited numerous cases in which it shows the duty of a pedestrian to walk facing the traffic, but has cited no case which shows a man would be guilty of contributory negligence, as a matter of law, if injured while walking in the lane of traffic in which the Statute requires him to walk.

We think that the plaintiff made out a prima facie case which should have been submitted to the jury for their consideration. The judgment of the Trial Court is hereby reversed and the cause remanded.

Judgment reversed and cause remanded.

313 I.A. 147²

Gen. No. 9696.

Agenda No. 10.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
OCTOBER TERM, A. D. 1941.

443
26

J. E. BARBER, Administrator of the
Estate of Anna S. Eber, Deceased,
Plaintiff-Appellee,
vs.
CLYDE R. NORTHCUTT,
Defendant-Appellant.

)
) Appeal from the Cir-
) cuit Court of Lee
) County, Illinois, to
) the Appellate Court
) of the Second District
) of Illinois.
)

WOLFE,-- P. J.

This is an appeal brought by Clyde R. Northcutt, the defendant, in a personal injury suit, in which J. E. Barber, Administrator of the Estate of Anna S. Eber, deceased, procured a judgment for \$3,500.00 for damages for the death of Anna S. Eber, deceased. Anna S. Eber died as a result of an injury sustained in a collision between the car in which she was riding with her daughter, Mary Elizabeth Eber, and a car owned and driven by Clyde R. Northcutt. The case was tried without a jury before the Honorable Harry E. Wheat, the Presiding Judge of the Circuit Court of Lee County.

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The collision occurred at the intersection of two gravel roads, one running practically north and south, and the other east and west. The car in which the deceased was riding with her daughter, Mary Elizabeth Eber, was travelling in a northerly direction, and the car in which the plaintiff was driving, was travelling in an easterly direction. The cars collided at the intersection, and as a result thereof, Anna S. Eber received injuries from which she died a few days thereafter. The defendant was accompanied in his car by members of the family, but none of them were injured.

The east and west road was practically level. On the north and south highway there was a slight slope to the north at the intersection. Both roads were dry and the weather clear. Neither of the roads were preferred highways and had no stop signs or other signs at the intersection. The car in which the deceased, Anna S. Eber, was riding was approaching the intersection from the right, and the defendant, Northcutt's car, from the left.

The appellant, Northcutt, has assigned five reasons why the judgment of the trial court should be reversed. Numbers 1, 2, 3 and 5 are practically the same, namely; that the judgment is contrary to the manifest weight of the evidence, and is contrary to law. The 4th is that the Court erroneously denied the proposition of law submitted by the defendant. In the appellant's brief and argument he states that the Court erred in refusing to hold, as a matter of law,

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certain propositions, but does not argue these points nor set forth the refused propositions in his brief and argument. Points raised, but not argued will be deemed waived by this Court.

Judge Wheat, in deciding the issues of fact and law, uses this language: "The testimony of the witnesses in this case is conflicting on the material issues; it conflicts on the question as to whether the north bound car was on the east or west side of the road; it conflicts as to the speed of both cars; it is disputed as to whether defendant's car was stopped or in motion, and as to where in the intersection the impact occurred. In view of such testimony, it is obvious that some or all of the occurrence witnesses are mistaken, in which event, great weight must be attached to circumstantial evidence, insofar as it tends to corroborate or contradict the witnesses on material points."

The judge then proceeded to analyse the testimony and circumstances, as related by the witnesses, and came to the conclusion that the accident in question was caused by the negligence of the defendant, Clyde R. Northcutt, and that the deceased, Anna S. Eber, and her daughter, Mary Elizabeth Eber, were not guilty of contributory negligence. We have read the evidence as abstracted, and think the trial Court's analysis of the evidence and his conclusions of facts and law are sustained by the record in this case.

We find no reversible error in the case. The judgment of the Trial Court is affirmed.

Affirmed.

certain propositions, and have not been able to establish
the refused proposition. It is not, however, a matter
but not argued with respect to the proposition.
This is largely a matter of fact, and it is not
likewise a matter of fact, and it is not a matter of
whether the proposition is true or false, and it is not
it conflicts with the proposition, and it is not a matter
defendant's own statement, and it is not a matter of
section 10 of the act, and it is not a matter of
that some of the facts are not in dispute, and it is not
event, great weight is given to the evidence, and it is not
insofar as it tends to establish the proposition, and it is not
material point, and it is not a matter of
circumstances, and it is not a matter of
that the facts are not in dispute, and it is not a matter of
defendant's own statement, and it is not a matter of
and her own statement, and it is not a matter of
negligence, and it is not a matter of
trial court, and it is not a matter of
law and equity, and it is not a matter of
of the facts, and it is not a matter of

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
OCTOBER TERM, A. D. 1941.

313 I.A. 148¹

463

Dovie Wilson, as Administratrix of
the Estate of Charles Herbert
Wilson, deceased,
Plaintiff-Appellee,
vs.
Decatur Cartage Company, an Illi-
nois Corporation, and Jessie Boomer,
Defendants-Appellants.)

Appeal from the
Circuit Court of
Kankakee County.

WLF,-- P. J.

The plaintiff-appellee, Dovie Wilson as Administratrix of the Estate of Charles Herbert Wilson, deceased, commenced a suit in the Circuit Court of Kankakee County. The defendants-appellants are Decatur Cartage Company, an Illinois Corporation, and Jessie Boomer. The action is for damages for the death of Charles Herbert Wilson, Plaintiff-appellee's intestate, who was killed in an automobile collision on May 7, 1940, when a truck in which he was driving collided with the rear of the truck of the Decatur Cartage Company driven by Jessie Boomer.

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At the time, the truck of the defendants was parked on the outer lane of traffic of a four-lane highway. The complaint is in the usual form and charges the defendants with general negligence by parking on a State Route contrary to statute, by failure to light truck and trailer, by failure to provide flares, by failure to keep a sufficient lookout, and by failure to keep motor truck under proper, safe and reasonable control.

There is no question raised in this appeal about the pleadings. The case was submitted to a jury who found the issues in favor of the plaintiff and assessed damages at \$7,500.00 for the death of Charles Herbert Wilson, and for the damage to the truck of plaintiff at \$843.50. The defendants filed motions for a directed verdict, judgment notwithstanding the verdict and for a new trial, all were denied. Judgment was then entered on the verdict for the amounts. It is from this judgment that the appeal is prosecuted.

It is insisted by the appellants that the charge of negligence in leaving the truck without adequate lights, or other warning of its presence on the highway is unsupported by the evidence. Examination of the testimony as abstracted, discloses that all witnesses except the defendant, Jessie Boomer, either testified positively that there were no lights burning on the truck, or trailer of the Decatur Cartage Company, or that they did not see any lights so burning, nor did any of these witnesses see any flares burning at the time that the first

At the time of the trial, the defendant was charged with the crime of...
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witness appeared upon the scene of the accident. The only witness who testified of any lights burning on the defendants' truck and trailer at the time of the accident, was Jessie Boomer. This was purely a question of fact to be submitted to the jury. The jury, by their verdict, have on this issue found in favor of the plaintiff, and against the defendants and we think that there is ample evidence in the record to support this finding of the jury.

It is claimed by the appellants that the truck standing on the highway was a mere condition, and not the proximate cause of the accident. This accident occurred on Route 49 about two miles North of the City of Mantena, Illinois. Route 49 is a four-lane paved highway forty feet wide. At the place of the accident, there was a shoulder twelve feet wide on each side of the pavement. Jessie Boomer, the driver of the Decatur Cartage Company's truck, was going in a southerly direction when he heard a loud noise under the truck or trailer. He stopped his truck and trailer on the west side of the pavement and got out and crawled under the truck to see what was the matter. He found that the spare tire had become detached from the truck and was dragging on the pavement. While under the truck fixing this tire, he was facing south, the direction his truck was headed. While he was replacing the tire the decedent, Charles Herbert Wilson, driving his truck ran into the rear of the defendants' truck and received the injuries from which he later died. It is uncontradicted that other

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truck drivers, arriving at the scene of the accident, drove their trucks off of the pavement onto the shoulder and experienced no difficulty whatsoever, in doing so. All stated that the shoulder was of adequate width, perfectly dry and hard. It appears that if the defendant, Boomer, had been so inclined he could have driven his truck off of the pavement and onto the shoulder to replace the tire without any difficulty in doing so. It is stipulated that there are signs erected by the State Highway Department along various points of this highway, and state in substance, "Drive in the outside lane except when passing." We find no merit in the contention that the presence of this unlighted truck upon the paved portion of the highway was not the proximate cause of the accident and injuries to plaintiff's intestate which caused his death.

Over the objection of the defendant, the plaintiff proved habits of due care and caution of deceased that he was a cautious and careful driver. It is contended by the appellant that this was improper because the defendant, Jessie Boomer, was an eye witness to the accident. After a careful reading of the evidence of Jessie Boomer, both in the abstract and the record, we fail to find any place where he states that he saw or knew anything about the accident until it actually occurred. He was rendered unconscious for a short time by the collision of the two trucks. It is conceded that there was no other eye witness to the accident, so we think the Court properly admitted the evidence

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of due care and caution on the part of the deceased. Our Courts have repeatedly held that where there are no actual eye witnesses to an accident, the habits of the deceased are competent to show due care on his part at time of accident. Humason vs. Michigan Central Railroad Company 259 Ill., 462; Greene vs. Fish Furniture Company 272 Ill. 148. Under the circumstances as presented in this case, the question of whether the deceased was guilty of negligence that proximately contributed to his death, was a question of fact for the jury to decide.

Complaint is made by the appellants in regard to some of the given instructions for the plaintiff and some that the Court refused to give on behalf of the defendants. What we have heretofore said in regard to the evidence in regard to due care is applicable to defendants' refused instruction No. 1. In regard to appellants' instruction No. 2, it is a general one and is covered by parts of defendants' instruction Nos. 3, 4, and 6. We find no merit in appellants' criticism of plaintiff's given instruction No. 1, or No. 3. On the whole we think that the Court fairly instructed the jury relative to the law in the case.

We find no reversible error in the case. The judgment of the Trial Court is affirmed.

Affirmed.

of the case and evidence of the
have repeatedly held in
in accident, the same was
on his part at some of the
Ford Company as a result of
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question of whether it was
mainly contributed to the
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the Court said that the Government had not shown that the defendant had any knowledge of the existence of the conspiracy at the time he joined it. The Court said that the Government had not shown that the defendant had any knowledge of the existence of the conspiracy at the time he joined it.

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Gen. No. 9708.

Agenda No. 40.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
OCTOBER TERM, A. D. 1941.

LYLE N. GRANGE,
Petitioner-Appellee,

vs.

W. W. RENTON, Mayor of the City of Wheaton,
Successor to William H. Caldwell,
C. R. BURKHOLDER, Chief of Police,
A. M. JENS, D. L. BODEN and J. C. HYDE,
Successor to H. F. DAVIS, Fire and Police
Commissioners of the City of Wheaton, City
of Wheaton, a Municipal Corporation, and
C. O. FREEDLUND, Treasurer of the City of
Wheaton,
Respondents-Appellants.

Appeal from
Circuit Court,
DuPage County.

WOLFE,-- P. J.

The appellee, Lyle N. Grange, filed in the Circuit Court of DuPage County, a petition for mandamus against W. W. Renton, the Mayor of the City of Wheaton, Successor to William H. Caldwell, C. R. Burkholder, Chief of Police, A. M. Jens, D. L. Boden and J. C. Hyde, Successor to H. F. Davis, Fire and Police Commissioners of the City of Wheaton, City of Wheaton, a Municipal Corporation, and

THE UNITED STATES OF AMERICA
DEPARTMENT OF THE ARMY
OFFICE OF THE CHIEF OF STAFF
WASHINGTON, D. C. 20315

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Wheaton,
O. FREEDMAN, Treasurer
of Wheaton, Chairman of Board,
Commissioners of the City of Chicago,
Successor to J. M. Jones,
J. M. JONES, I. M. Jones & Co.,
R. DUNBAR, Successor to J. W. Hewitt,
Successor to J. W. Hewitt,

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C. O. Freedlund, Treasurer of the City of Wheaton, alleging duress in obtaining the petitioner's resignation as Chief of Police of the City of Wheaton, Illinois, and alleging that he resigned involuntarily. The plaintiff asked to be reinstated and to be assigned to the Police Department of the City of Wheaton as Chief of Police, Sergeant or Patrolman, and that his name be restored to the pay rolls of said city. The petition, as amended, alleges that the petitioner was appointed Chief of Police on the 12th day of May 1931; that in April 1934, the electors of the City of Wheaton adopted the 'Fire and Police Commissioner's Act,' whereupon, the Police Department became subject to the rules and regulations of the Board of Fire and Police Commissioners of the city. It is further alleged that on August 3, 1937, Doctor W. V. Hopf, Commissioner of Health and Safety and in charge of the Police Department of said city, told the petitioner that the Board of Fire and Police Commissioners requested him to obtain the petitioner's resignation; that on that date he resigned, which resignation he subsequently withdrew; that on October 6, 1937, Doctor W. V. Hopf again told the petitioner that unless he resigned, he could be ousted from his position, whereupon, he tendered his resignation, which is as follows:

"Wheaton, Illinois,
October 6, 1937.

Doctor W. V. Hopf,
Commissioner of Public Health and Safety.

Please accept my resignation as Chief of Police of the City of Wheaton to be effective from this date.

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I have appreciated your help in a great many ways since you have taken office.

Signed Lyle N. Grange,
Chief of Police."

The petition further alleges that said resignation was intended to apply only to the office of Chief of Police, and not to membership in the department, and was obtained by threats of duress and coercion; that subsequent to the first day of January A. D. 1938, the petitioner reported to the police station for work, but his services were declined.

It is further charged that he was unlawfully and illegally discharged in violation of Section 12, of the 'Fire and Police Commissioner's Act,' and he asked that a writ of mandamus be issued to restore him as Chief of Police, Sergeant or Patrolman of the City of Wheaton, and to restore his name to the pay roll of said city.

The defendants filed their answer admitting that the petitioner, Lyle N. Grange, had resigned, as stated in the petition, but that the resignation was not simply as Chief of Police, but as an unconditional resignation from the Police Department of the City of Wheaton. The answer also denies that there was any duress whatsoever in obtaining petitioner's resignation, or that petitioner brings himself within the 'Fire and Police Commissioner's Act,' or that he is entitled to the protection of said act. It alleges that Lyle N. Grange acted freely and voluntarily in resigning from the Police Department, but denies that he was unlawfully or illegally discharged.

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The case was tried before the Court who found that the petitioner had resigned as Chief of Police, but had not resigned from the Police Department of the City of Wheaton. The Court also found, that petitioner did not sustain the burden of proof in showing that he was coerced in resigning as Chief of Police of the City of Wheaton, but did find that Section 12, of the 'Fire and Police Commissioner's Act,' as amended in 1937, should operate retroactively, and that the petitioner, Lyle N. Grange, was unlawfully and illegally discharged as a member of the Police Department of the City of Wheaton. The Court ordered that a writ of mandamus be issued to restore the said Lyle N. Grange on the city's record as a Patrolman and member of the Police Department of the City of Wheaton. It is from this order that the appeal is prosecuted.

In order to sustain the contention that the petitioner tendered his resignation under duress and coercion, Lyle N. Grange, over the objection of the defendants, testified to numerous conversations that he had had with Doctor Hopf, the Commissioner of Health and Safety of the City of Wheaton. At the time of the hearing, Doctor Hopf was dead. The Court announced that he would hear the evidence subject to the objection of the defendants. In the appendix attached to the appellee's brief, we find the decision of the trial court in which he announces that the conversations related by Mr. Grange with Doctor Hopf were not admissible in evidence, and he was not considering

The following information was obtained from the records of the
 Department of the Interior, Bureau of Land Management, at
 Washington, D. C., on July 1, 1964, in response to a letter
 dated June 15, 1964, from the Bureau of the Census, Washington,
 D. C., regarding the land ownership of the State of Alaska.
 The information was obtained from the records of the Department
 of the Interior, Bureau of Land Management, at Washington,
 D. C., on July 1, 1964, in response to a letter dated June
 15, 1964, from the Bureau of the Census, Washington, D. C.,
 regarding the land ownership of the State of Alaska.

it as evidence. In the Third Paragraph of the judgment order the Court finds: "That the conversations petitioner is alleged to have had with Doctor W. V. Hopf, Commissioner of Health and Safety of the City of Wheaton, is inadmissible as evidence of this case." There is therefore no evidence whatsoever to sustain the contention of the petitioner that he resigned under duress and coercion of any member of the Police Department, nor is there any evidence that anything was said or done at the time the resignation was tendered by the petitioner, that would sustain his contention that he intended to resign only as Chief of Police, and not from the Police Department.

It is admitted by the pleadings that after Mr. Grange tendered his resignation, the City of Wheaton continued to pay his salary as Chief of Police up to and including January 1, 1938. It will be observed that this was under the old appointment as Chief of Police, and not as a Patrolman. The evidence shows that subsequent to the first day of January, A. D. 1938, that Mr. Grange presented himself to the Chief of Police of the City of Wheaton, and requested that he be assigned duties in connection with the department, but he was told that he was no longer connected with the Police Department, and that it was impossible to assign him any duties.

There being no evidence to sustain the petitioner's contention that his resignation was procured by duress or coercion by the city, or what was said and done by the various parties at the

time the resignation was tendered, the only question for us to decide is what is meant by the petitioner's written resignation. If it must be construed that Mr. Grange resigned from the Police Department instead of just as Chief of Police, the other questions argued in the briefs of the parties become immaterial. It appears to us that the proper construction to be given to this resignation, is, that the petitioner intended to, and did resign from the Police Department of the City of Wheaton, Illinois.

It will be noted that the petition charges the officers of the Police Department of the City of Wheaton, of obtaining this resignation under duress and coercion. If this had been proven, it would make no difference whether he had resigned simply as Chief of Police, and not as Patrolman, or whether he had resigned from the Police Department. If he could prove that his resignation was not voluntarily tendered, then he would be entitled to the writ of mandamus to be reinstated as a member of the Police Department. Another thing we think tends to show that he resigned from the Police Department and not simply as Chief of Police, is that the city voluntarily paid him three months' salary, not as a Patrolman, but as Chief of Police, and at the end of that time the city notified him that he was no longer a member of the police force of the City of Wheaton, Illinois.

To entitle the petitioner to the writ of mandamus, he must establish his right to the writ by clear and convincing evidence. This,

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he has failed to do. It is our conclusion the trial court erred in finding that Lyle M. Grange, by his written resignation of October 6, 1937, resigned only as Chief of Police, and not as a member of the Police Department. The order appealed from is therefore reversed.

Reversed.

he has failed to find the evidence of the
finding that this is a case of a
1937, resigned and was found to be
Police Department. The evidence is
evidence.

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313 I.A. 149¹

Agenda No. 22.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
OCTOBER TERM, A. D. 1941.

473
29

CLARENCE SANDBERG, a minor,
by Charles A. Sandberg, his
next friend,
Appellee,
vs.
MARION C. WILLIAMS, MARVIN
C. WILLIAMS, and JOHN R. ANDREWS,
Appellants.

Appeal from the
City Court of
Aurora, Illinois.

WOLFE,-- P. J.

This is an action to recover damages from Marion C. Williams and Marvin C. Williams for an injury resulting from a collision between the motorcycle on which Clarence Sandberg was riding and the automobile of Marvin C. Williams, which was being operated by Marion C. Williams at the time of the collision. The complaint consisted of four counts, but before going to the jury, the third count was dismissed. The first count of the complaint, commonly

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Gen. No. 0710

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CLARENCE SAMPSON, by Charles H. Sampson, next friend.

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MARION C. WILLIAMS, and C. WILLIAMS, and ...

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... Williams ... collator ... riding ... operated by ... completing ... third count ...

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called the Jennings's Count, charges that Marion C. Williams, on her own behalf, and as the agent of Marvin C. Williams, negligently operated an automobile which caused the injury to the plaintiff. The second count charges that Marion C. Williams, while driving the car as aforesaid, failed to yield the right of way to the plaintiff, Carl Sandberg, and the fourth count, that Marion C. Williams failed to keep a proper lookout for Carl Sandberg, and therefore the plaintiff was injured. All of the counts charged that at the time of the injury to the plaintiff, he was in the exercise of due care and caution for his own safety.

At the close of the plaintiff's case the defendants entered a motion for a verdict for the defendants. This motion was denied. At the conclusion of all of the evidence, a like motion was made by the defendants. This motion was also denied. The case was submitted to a jury who found the issues in favor of the plaintiff and assessed the damages at three thousand dollars. The defendants entered a motion for a new trial, which was overruled, and judgment was entered on the verdict in favor of the plaintiff for three thousand dollars. It is from this judgment that the appeal is prosecuted.

The evidence discloses that on July 4, 1940, the plaintiff was riding and driving his motorcycle in a westerly direction on Main Street in the City of Aurora, Illinois; that the defendant, Marion C. Williams, is the wife of Marvin C. Williams, and that their residence

called the "Lafayette" and was a small boat, owned by the
own family, and was used for the purpose of fishing.
operated an extensive fishery, and was the owner of the
The second boat was a larger one, and was used for the purpose of
carrying fish to market. It was owned by the same family.
Carl Sandberg, who was the captain of the "Lafayette", was
to keep a proper log of the fish taken, and to report the same
to the Fish Commission. It was found that the log was not
kept, and that the fish were sold without being reported.
injury to the family, and that the family was not
for his own self.

At the time of the trial, the family was in a
motion for a verdict, and the family was in a
the commission, and the family was in a
defendants. The family was in a
jury who found the family liable for the
damages of \$10,000. The family was in a
a new trial, and the family was in a
in favor of the family, and the family was in a
judgment that the family was liable for the
The family was in a
was right, and the family was in a
Street in the city of
Williams, and the family was in a

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is located on the south side of Main Street in said City of Aurora; that Marion C. Williams was driving her husband's automobile out of her driveway in a northerly direction towards Main Street; that said driveway was on the east side of the dwelling house; that the lot on which the dwelling house is located is 55 feet east and west exclusive of the driveway; that before Mrs. Williams entered Main Street, she stopped with the front end of her car on the sidewalk in front of the house; that she left the car there and went into her home to get her pocket-book; that she came out and started her car. She looked to her right, which would be east, and saw the plaintiff approaching on his motorcycle at the intersection of the street east of her home; that she looked to her left and waited until no cars were passing, then proceeded in a northerly direction and turned to the left and had proceeded in a westerly direction at least 58 feet when the motorcycle, driven by the plaintiff, collided with the right rear fender of the defendants' car; that plaintiff was thrown from his motorcycle and was injured; that at the time the collision occurred, the defendants' car was all or practically all on the north side of the white line in the center of the street; that at this place the paved part of Main Street is 41 feet wide; that on the south side of Main Street next to the defendants' home there was a parked car; that on the north side of Main Street near where the accident occurred, there was also a parked car; that at this time there were no cars approaching, either

located on the south side of the road, near the intersection of the road with the highway. The house was a small, one-story building with a gabled roof. The driveway was on the left side of the house. The house was situated on a slight rise. The driveway was paved. The house was surrounded by a fence. The house was built of brick. The house was in good condition. The house was the only building on the property. The house was the only building on the street. The house was the only building in the neighborhood. The house was the only building in the area. The house was the only building in the town. The house was the only building in the county. The house was the only building in the state. The house was the only building in the country. The house was the only building in the world.

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from the east or west near where the collision occurred. The evidence further shows that the plaintiff, as he approached the driveway from which the William's car was emerging, saw the car and that it was moving at the time he first saw it, but he did not see the car again until just before the collision occurred. There is very little, if any, dispute about any material fact in issue in this case.

The appellants seriously insist that there is no evidence in the record to show that the plaintiff was in the exercise of ordinary care for his own safety at the time the collision occurred, also that there is no evidence tending to show that the defendants were guilty of any negligence which was the proximate cause of the injury to the plaintiff. It is also insisted by the appellants that the verdict of the jury is against the weight of the evidence.

Appellate Courts are reluctant to set aside the verdict of a jury wholly on a question of fact, but when the Court is convinced that the verdict of a jury is against the manifest weight of the evidence, then it is the duty of the Appellate Tribunal to exercise its discretion and reverse the judgment. After reading all of the evidence in this case, it is our conclusion that the verdict of the jury in this case is contrary to the manifest weight of the evidence. The judgment of the Trial Court is hereby reversed and the cause remanded.

Reversed and Remanded.

OK
164-1-1
Gen. No. 9726.

312 I.A. 149²

Agenda No. 25.

IN THE
APPELLATE COURT OF ILLINOIS,
SECOND DISTRICT.

OCTOBER TERM, A. D. 1941.

JOSEPH LEONARD, a Minor, by AGATHA
FITZJARRALD, His Mother, as Next
Friend,
Plaintiff-Appellee,
vs.
WAYNE STONE,
Defendant-Appellant.

483
30
Appeal from
Circuit Court,
Peoria County.

WOLFE,-- P. J.

This is an action at law brought by Joseph Leonard, a minor, by Agatha Fitzjarrald, his mother, as next friend, against Wayne Stone in which the plaintiff claims damages for injuries he sustained in an accident in which Joseph Leonard was a passenger in the automobile of Wayne Stone. The accident occurred on the 18th of January 1939, on Westmoreland Street in the City of Peoria, Illinois.

The plaintiff's complaint consists of four counts. The first

Gen. No. 100

STATION 100

STATION 100

JOSEPH H. HONOLULU
TITZJAHN, JR.
Friend

WAYNE STONE

WOLFE, --

Wolfe, Jr.
Wayne St.

Wolfe, Jr.
Wayne St.

of 100

2.

count charged the defendant with general negligence and careless conduct in the operation of the automobile. The second count charged the defendant with the failure to keep said automobile under safe and proper control. The third count charged the defendant with negligence in carelessly managing and operating the automobile at an excessive rate of speed when there was ice on the pavement, and causing the automobile to skid and injuring the plaintiff. The fourth count charged the defendant with wilful and wanton misconduct in the operation of the automobile. The first three counts charged that through the negligence of the defendant in the way he managed and operated the automobile, the plaintiff was injured, and at all times the plaintiff was in the exercise of ordinary care for his own safety. The fourth count charges that by reason of the wilful and wanton misconduct of the defendant, the plaintiff was injured. The defendant filed his answer denying the allegations of any negligence, as charged in the first three counts, and of any wilful and wanton misconduct on the part of the defendant, as charged in the fourth count. After the trial had proceeded and four jurors had been accepted by the plaintiff, the plaintiff dismissed the fourth count of the complaint. The case proceeded to trial under the first three counts of the complaint, and the jury found the issues in favor of the plaintiff, and assessed his damages at \$1,500.00.

At the close of the plaintiff's evidence, the defendant

count charged... conduct in the... the defendant... proper control... in careless... rate of speed... automobile to... changed the... operation of... through the... operated the... the plaintiff... The fourth... conduct of... filed his... in the... the part of... trial had... the plaintiff... proceeded... the jury... damages of...

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offered a motion asking the court to instruct the jury to find the defendant not guilty. This motion was denied by the Court. At the close of all of the evidence, the defendant again asked the Court to instruct the jury to find the defendant not guilty. This motion was also denied. Prior to the closing argument to the jury, the defendant tendered to the Court a special interrogatory, and asked the same be given to the jury. This request was also refused by the trial court. Judgment was then entered on the verdict in favor of the plaintiff for \$1,500.00, and it is from this judgment that the appeal is prosecuted.

After the plaintiff had dismissed the fourth count of the complaint, the defendant asked leave to file an amended answer to the first three counts of the complaint. They now insist in this Court that it was reversible error for the Trial Court to refuse to allow them to file an amended answer. The assignment of error, as stated in their argument is, "The Court erred in refusing to allow the defendant to withdraw his answer and file motion to dismiss, which motion was filed before the jury and the taking of evidence, and if allowed, would have given the defendant more specific information." What the answer was, as originally filed, is not disclosed by the abstract, as the same is not contained therein. The filing of a motion or the granting of leave to file further pleadings, is largely in the discretion of the trial court. What the amended answer would contain, which was not contained

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... was also denied ...
... defendant ...
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in the original answer, the record does not disclose, and how the defendant was prejudiced in any manner, is not shown by the record in this case.

It is also insisted that the three counts in the complaint failed to charge the defendant with wilful and wanton misconduct, therefore the Court erred in refusing to hold that the plaintiff could not recover because of the Guest Statute of the State of Illinois. The Supreme Court, in the case of Connett vs. Winget 374 Illinois 531, in discussing whether a person is a guest, as defined in our Statute, uses this language: "In determining whether a person is a guest within the meaning of the "Guest statutes" in the several States, consideration is given to the person or persons advantaged by the carriage; if it confers only a benefit incident to hospitality, companionship or the like, the passenger is a guest, but if the carriage tends to promote mutual interests of both the person carried and the driver, or if the carriage is primarily for the attainment of some objective or purpose of the operator, the passenger is not a guest within the meaning of such enactments." In order to decide whether the plaintiff was a guest in the defendant's car, it is necessary to review the evidence. The plaintiff testified that he had been employed by the defendant to do odd jobs such as running errands, occasionally tending to the soda fountain and cleaning the restaurant or lunch stand which the defendant was operating at the time of, and previous to the accident in question.

[illegible]

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The place of business was what is commonly called a "Drive in Refreshment Stand." According to the plaintiff's testimony, he was employed the night of the accident in this kind of work, and about ten or eleven o'clock in the evening his aunt called to take him home, and that the defendant, Stone, told the aunt that he wanted the boy to stay at the restaurant and help him with the work and sweep up just prior to the time they closed the restaurant, and that he would take the plaintiff home. The defendant was called as an adverse witness by the plaintiff, and he denied that the plaintiff had ever worked for him, or that he had any such conversation with the boy's aunt. He denied that the aunt called at the place of business the evening of the accident, or that he knew the aunt. The plaintiff introduced in evidence a written statement which the defendant admits that he signed shortly after the accident occurred. This exhibit shows that he stated then that the boy had worked for him previous to the accident on several occasions; that he had paid him small amounts for his services, and that he was working for him the night of the accident; that the aunt called for the plaintiff and he told her that he wanted the plaintiff to stay there and help him, and that he would see that the boy was taken home after they closed the place of business.

In the car at the time of the accident, were two other persons. One was Ruth Tockes who also worked at the restaurant and Stephen Mitrovich who was a friend of Miss Tockes and had spent the

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Stephen...

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most of the evening at the restaurant. Each testified that they saw the aunt of the plaintiff come to the restaurant, and heard her ask the plaintiff to go home with her, and heard the defendant say that he wanted the plaintiff to stay at the restaurant and help him until he closed up, and that he would take the plaintiff home. From this evidence, it clearly appears that the plaintiff had worked for the defendant prior to the time of the injury, and had been employed by him several hours before the accident occurred, and as part of the employment he was to see that the plaintiff was taken home. When the defendant requested the plaintiff to stay and help him out in the conduct and care of his restaurant, and agreed to take him home after the restaurant was closed, and then in fulfillment started home with the plaintiff, then the carriage tended to promote the mutual interest of both the plaintiff and defendant, and under the rule, as announced in *Connett vs. Winget*, supra, the plaintiff was not a guest, but a passenger in the car of the defendant.

It is next insisted that the Court erred in the admission of incompetent, improper and irrelevant medical testimony on the part of the plaintiff. The record does not disclose that the defendant made any objection whatsoever to any of the questions asked, or to the doctor's answers when he gave his testimony. Therefore this assignment of error cannot be considered by this Court.

It is also insisted that the Court committed reversible

[illegible]

error in giving plaintiff's instructions, and on the question of injury and medical expense the Court erred in light of the testimony given on behalf of the plaintiff for medical expense in giving the following instruction: "The Court instructs the Jury that if you find the issues for the Plaintiff, Joseph Leonard, it is your duty to assess his damages and in arriving at whatever damages, if any, he may be entitled to, you have a right to and should take into consideration if shown by the evidence the nature and extent of Plaintiff's injuries, if any, as a result of such injuries; his pain and suffering, if any, as a result of such injuries, and from all the facts and circumstances in evidence, award to the Plaintiff, Joseph Leonard, such sum as you find from the evidence to be reasonable and fair compensation for damages sustained or which may be sustained by him in the future, if any, as a direct and proximate result of said injuries." It is claimed that the instruction was erroneous and misleading because the evidence in this case clearly shows that the medical and hospital expense was not charged to the plaintiff in the case, and that this was the only instruction given in regard to damages. This instruction does not make any reference whatsoever to medical or hospital expenses, so the jury could not be misled by the giving of this instruction.

It is insisted that the Court erred in the admission of incompetent, improper and irrelevant testimony on the part of the plaintiff. Appellant's argument is directed to the weight and not the

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admissibility of the evidence of the plaintiff. We find no error in the admission of plaintiff's evidence.

It is insisted that the Court should have directed a verdict in favor of the defendant at the close of the plaintiff's evidence, and at the close of all of the evidence, because the plaintiff failed to prove any negligence on the part of the defendant, and also that the plaintiff failed to prove that he was in the exercise of ordinary care for his own safety at the time the accident occurred. The evidence shows that at the time of the accident, the streets of the City of Peoria were covered with ice; that the defendant with the plaintiff, and the other two parties, heretofore mentioned, were riding with the defendant in his coupe; that the plaintiff was sitting at the right of the defendant on the front seat, and the other two parties in the rear; that the car had skidded several times, and according to the plaintiff, the defendant was driving between 30 and 40 miles an hour on this icy street when the car skidded, went over the curbing and struck a tree, and the plaintiff was injured. The defendant denies that he was driving at this rate of speed, but claims he was driving at a reasonable and ordinary speed. This was a question of fact for the jury to decide. If they believed that the defendant was driving at the approximate speed at which the plaintiff testified, the jury would certainly be justified in finding that this was an excessive rate of speed, considering the icy condition of the street. The plaintiff was riding in the front seat with the driver of the car, and had

nothing to do with its operation. Whether he did something that he ought not to have done, or did not do something that he should have done, was a question of fact for the jury to decide from all the evidence in the case. We cannot say that the jury's verdict in this particular matter was against the manifest weight of the evidence, so their decision will not be disturbed by us.

At the conclusion of the evidence and before the arguments of counsel to the jury, the defendant asked the Court to submit to the jury the following interrogatory: "Do you find from the evidence at the time of the accident, that the plaintiff, Joseph Leonard, was an employee in the employ of the defendant, Wayne Stone?" The Court refused to submit the interrogatory to the jury, but marked the same "refused." It is now insisted that this was reversible error by the Court's refusal to give the special interrogatory. Just why the trial court refused to submit this interrogatory, we do not know, and we think that the Court could properly have submitted this question of fact to the jury, but unless the defendant has been prejudiced in some manner by the refusal to submit this interrogatory, and that the answer to this question would have resulted in a different verdict for the defendant, he has not been prejudiced. The defendant testified positively that he never had employed the plaintiff, or that he was employed the evening of the accident. The plaintiff testified positively that he had been employed before the time of the accident,

nothing to do with the evidence. The evidence was not
ought not to be taken into account, or it would be
done, was a fact which was not in dispute. The
evidence in the case was not in dispute. The
particular subject of the evidence was not in dispute.
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and was employed that evening, and as before stated, the written statement of the defendant showed that he had been so employed, and the other two witnesses, the passengers in the car, corroborated the plaintiff in his statement. This was a question of fact that was squarely presented to the jury for their determination without being given the special interrogatory. We do not think the Court erred in refusing to give this special interrogatory.

There are other assignments of error, but our conclusion that the plaintiff was a passenger, and not a guest in the defendant's car at the time of the accident in question, fully disposes of the other contentions of the appellant. On the whole, we think that the plaintiff and defendant had a fair and impartial trial, and that the judgment of the trial court should be affirmed.

Affirmed.

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313 I.A. 150

Extra

Gen. No. 9729.

Agenda No. 28.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
OCTOBER TERM, A. D. 1941.

493
31

W. J. VIERCK and HERBERT H. VIERCK,)	
co-partners, doing business under the firm)	
name and style of "W. J. VIERCK & SON,")	
Plaintiffs-Appellants,)	Appeal from
)	Circuit Court,
vs.)	Winnebago County.
)	
EDITH A. LINDBERG,)	
Defendant-Appellee.)	

WOLFE,-- P. J.

This is an appeal from the Circuit Court of Winnebago County, Illinois, which dismissed the complaint of the plaintiffs in which they seek a lien on property of the defendant for hardware of the value of \$450.00 allegedly ordered by the defendant and furnished to her by the plaintiffs. The defendant, Edith A. Lindberg, was the owner of the property described in the petition on which she was erecting a residence. It is claimed by the plaintiffs that she ordered from them certain hardware to be used in the construction

Gen. No. 1001

Oct 10 1910

W. J. VIERMAN, JR.,
co-partners, John J. VIERMAN, JR.,
Name and title of the person or persons
with whom the order is placed
EDITH A. BENTLEY

WOLFE, --
County, Illinois,
in which the order is placed
of the value of the order
furnished to the person or persons
was the order placed
she was a single person
she order

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of the building. This, the defendant flatly denies. The hardware, which is the subject-matter of this dispute, was known as, a special order, and was made especially for the house of the defendant. The factory shipped the material to the plaintiffs who delivered it to the property of the defendant without the defendant's knowledge. The house was in the course of construction. The hardware was in a package and was placed in the building by some one for the plaintiffs, and was found by the defendant's husband the next morning before the workmen came. The hardware was immediately returned to the plaintiffs and was never used in the erection of the building. Before the hardware was taken to the building, one of the plaintiffs had a telephone conversation with the husband of the defendant in which he notified the plaintiffs that they would not use any of the hardware furnished by the plaintiffs, as they had procured their hardware for this house at another place. It is uncontradicted that at the time the hardware was delivered by the plaintiffs to the property of the defendant, they had actual knowledge that the hardware would not be used by the defendant in the erection of the building.

The abstract contains an opinion rendered by the trial court at the time he denied the plaintiffs' petition for a Mechanic's Lien on defendant's property. We have considered this opinion, and we think that it states the law in a concise and plain manner. As before stated, at the time the plaintiffs delivered this material to the home

of the building. The building is a two-story structure, which is the main building of the factory. The building is made of brick and has a flat roof. The building is surrounded by a fence and there is a gate. The building is in good condition and is well maintained. The building is the main building of the factory and is the largest building on the premises. The building is made of brick and has a flat roof. The building is surrounded by a fence and there is a gate. The building is in good condition and is well maintained. The building is the main building of the factory and is the largest building on the premises.

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of the defendant, they knew that the same would not be used by the defendant in the construction of this new building. We agree with the trial court that the plaintiffs have not shown a state of facts which entitles them to a Mechanic's Lien. The judgment of the Trial Court will be affirmed.

Affirmed.

of the defendant, the court will not allow the
 defendant to be heard in the trial court, and the
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 the defendant to be heard in the trial court.

112

313 I.A. 151¹

Gen. No. 9732. Agenda No. 31.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT
OCTOBER TERM, A. D. 1941.

503
32

WILLIAM ZAWADA, Administrator of
the Estate of John Zawada, deceased,
Plaintiff-Appellee,
vs.
FRANK O. LOWDEN, JAMES E. GORMAN and
JOSEPH B. FLEMING, Trustees of the
Estate of the Chicago, Rock Island
& Pacific Railway Company, a cor-
poration,
Defendants-Appellants.)

Appeal from
Circuit Court,
Rock Island County.

WOLFE,-- P. J.

William Zawada, Administrator of the Estate of John Zawada, deceased, started this action at law in the Circuit Court of Rock Island County, against Frank O. Lowden, James E. Gorman and Joseph B. Fleming, Trustees for the Chicago, Rock Island & Pacific Railway Company, a corporation, to recover damages for the death of John Zawada. The pleadings consisted of one count filed by the plaintiff in which it is alleged that the defendants who are the

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Trustees of the Rock Island Railway Company, owned and operated a railroad through the City of Moline, Illinois; that through the negligence and carelessness of the defendant company, the plaintiff, while in the exercise of ordinary care and caution for his own safety, in attempting to cross the tracks of the defendants, was struck by a passenger train owned by the defendants and plaintiff's intestate was killed. The complaint charges numerous acts of negligence on the part of the defendants.

The defendants filed their answer in which they admitted that they were the trustees, as alleged in the complaint, and were operating trains, as charged at the time the accident occurred. They denied any and all acts of negligence on their part that in any way contributed to the accident in question, and denied that the plaintiff's intestate was in the exercise of due and ordinary care for his own safety at the time he was killed, and charge that it was on account of his negligence that the accident occurred. The case was tried before a jury who found the issues in favor of the plaintiff, and assessed damages at \$4,500.00. At the close of the plaintiff's case, the usual motions for peremptory instructions were filed asking the Court to direct a verdict in favor of the defendants. This motion was overruled, and at the close of all of the evidence the motion was renewed, but denied. The motion for a new trial and for judgment notwithstanding the verdict was also overruled, and the

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while in the exercise of...
in attempting to...
passenger train...
was killed. The...
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that they were the...
operating...
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plaintiff's...
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case, the...
the Court...
motion was...
motion was...
judgment notwithstanding...

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Court entered judgment in favor of the plaintiff for \$4,500.00. It is from this judgment that this appeal is prosecuted.

At the request of the plaintiff, the Court gave to the jury the following instruction: "(3) The Court instructs the Jury that it was the duty of the defendants in approaching the crossing in the plaintiff's complaint set forth, either to ring a bell of not less than thirty pounds weight or sound a whistle, at a distance of at least eighty rods from said crossing, and that such duty to ring such bell or to sound such whistle continued until the crossing was reached, and if you find from the evidence that the plaintiff's intestate suffered injuries from which he died, as charged in the complaint, and that the defendants failed in the duty to ring or whistle as heretofore stated, and that in failing to perform their said duty in this regard, the defendants were negligent and that such negligence was the proximate or immediate cause of the injuries to the plaintiff's intestate from which he thereafter died and for which plaintiff sues them, you will find the issues for the plaintiff provided you further believe from the evidence that the plaintiff's intestate at the time and place of the injuries was in the exercise of ordinary care for his own safety."

It is seriously contended by the appellants that the giving of this instruction was reversible error, as there is no charge in the complaint that the defendants had violated any statute by not ringing

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the bell, or blowing the whistle, as stated in this instruction. The charge of negligence on which this instruction was based is Paragraph I of the complaint, which is as follows: "That it was the duty of the defendants, by their servants and agents, to give warning of the approach of said train by the ringing of a bell, or the blowing of a whistle, but that the defendants failed to give such warning and were negligent in that respect." In the case of Chicago, Burlington & Quincy Railroad Company vs. Harry G. Well, 42nd Ill. App. at Page 26, this Court had occasion to decide the exact question that is now presented by this appeal. In that case the charge of negligence against the railroad company was exactly the same as in the present one, namely, the failure to give warning of the approach of the train by the ringing of a bell, or of the blowing of a whistle. In the Burlington Railroad case we there held that the charge of negligence was a breach of a common law liability and not a statutory one, and the giving of an instruction that contained the charge that it was the duty of the railroad company to ring a bell, or sound a whistle continuously for a distance of eighty rods before reaching the highway crossing in question, was improper and reversible error because the declaration did not charge any such violation of the law, as provided in the statute.

The instruction complained of is mandatory, as it directs a verdict in favor of the plaintiff, if from the evidence, they believe that the defendants failed upon approaching the crossing, either to

[illegible]

ring a bell of not less than thirty pounds in weight, or sound a whistle of a distance of at least eighty rods from said crossing, and if the jury believed from the evidence that the defendants failed in this statutory duty, and that that failure was the proximate cause of the injury to the plaintiff, and the plaintiff was in the exercise of due care and caution for his own safety, then they should find the defendants guilty. When the plaintiff sets out in his complaint the negligent acts of the defendants relied on as a basis of recovery, he must establish those negligent facts and cannot recover by reason of negligent acts of the defendants not averred in the declaration, as a ground of recovery even though the acts proven show the defendant was guilty of the negligence which caused his injury. *Buckly vs. Mandell Brothers* 333 Ill. Page 368; *Chicago City Railroad Company vs. Bruley* 215 Ill. 464. It is our conclusion that the instruction in question was fatally defective and should not have been given, as the charge in the complaint was a violation of a common law duty, and the instruction was applicable only when a violation of a statutory duty was charged, and it placed a responsibility upon the defendants that was not charged in the complaint.

The appellants complain of the Court's failure to give their refused instruction No. 5. Why this instruction was refused, we do not know. The trial court may have been of the opinion that it was covered by other instructions, but it seems to us that this

ring a bell or of blowing a whistle of alarm and if the jury find in this state of mind of the injured party of the cause of the negligence of the defendant he must establish that the negligent act of the defendant as a ground of recovery was guilty of negligence. In question the jury the change and the fact that duty duty duty defendant their duty we to was covered

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instruction, if it were not covered by other instructions, could very well have been given. Appellants make complaint of plaintiff's given instruction No. 2 and No. 4. Each of these instructions fail to say that the negligence of the defendants was limited to that charge in the complaint, but left to the jury to speculate as to what the negligence might be. We think that the instructions should have contained a clause limiting the negligence of the defendants to that charged in the complaint.

The major parts of appellants' and appellee's brief are devoted to the facts in the case. It is seriously contended by the appellants that the court erred in not directing a verdict in their favor, as there is no evidence ~~of~~ showing any negligence on the part of the defendants, and the evidence of the plaintiff shows as a matter of law, that the deceased was not in the exercise of due care and caution for his own safety at the time he was killed. We do not express any opinion whatsoever in regard to the evidence in the case, as the same will have to be reversed and remanded for a new trial, for other reasons.

For the error of the Court in giving plaintiff's instructions Nos. 2, 3 and 4, the judgment of the Trial Court is hereby reversed and the cause remanded.

Reversed and cause remanded.

Instruction, it is to be noted, that the negligence
well have been... Instruction... that the negligence... the complexity... negligence... contained... charged in the...

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... as the cause... for other... Nos. 1, 2, 3... the cause... the cause...

211-151

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GEN. NO. 9736

AGENDA NO. 44

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

October Term, A.D. 1941.

DEANA CRUMP,

Appellee,

vs.

MONTGOMERY WARD &
COMPANY, INC.,

Appellant.

APPEAL FROM THE
CIRCUIT COURT OF
LAKE COUNTY.

DOVE, J.

Appellee recovered a verdict and judgment for \$1900.00 against appellant in the circuit court of Lake County for injuries sustained by reason of the sudden closing of one of the entrance doors of appellant's store at Naukegen, whereby she was struck in the back by a horizontal metal bar on the door as she was passing through the doorway. She was severely injured in the left sacro-iliac joint and the coccyx bone, necessitating extensive treatment and the use of plaster casts. The extent of her injuries is not questioned and the judgment is not claimed to be

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excessive. It is insisted by counsel for appellant, however, that the trial court erred in overruling appellant's motions for a directed verdict and for judgment notwithstanding the verdict.

Counsel for appellee contends that under the evidence the doctrine of *res ipsa loquitur* applies, and that even if that doctrine is not applicable, there is sufficient evidence to sustain the charges of negligence on the part of appellant as alleged in the complaint, while counsel for appellant takes the opposite stand.

The evidence discloses that on December 17, 1938, between 12:00 and 12:30 P. M., plaintiff, with her husband and other relatives, went to appellant's store to do some Christmas shopping. The store is on the east side of Genesee Street. There are three show windows in the front of the store, one on the north, one on the south, and a wide one in the center. On the sides of the center window are passage ways which meet behind it. There are no doors at the street line. On the east side of the passage way behind the center window are two pairs of double doors about twenty-five feet back from the sidewalk. The doors are of plate glass with metal frames surrounding the glass. They weigh about two hundred pounds each, and open outward toward the street. There are two horizontal metal bars on each side of each door, the lower one of which is about thirty-seven and one-half inches above the floor. Each door is equipped with hydraulic hinges, designed to operate as a check when the doors are closing. On each door was a metal door stop or holder of the plunger type. To hold the door open, the plunger is pressed down and engages the floor. The plunger has some material on the bottom designed to cause it to adhere to the floor. A trigger on the side of the stop three and one-half to four inches above the bottom of the door allows the plunger to be released and an inner spring retracts it. A short distance east of these doors there are two other pairs of double

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doors leading into the store. They also open outward. The passage way slopes downward from the outer doors to the street, and when the doors are open the outer edge of the door is about one inch above the floor.

Appellee and her husband testified that at the time of the accident, the outer doors were open and the inner doors were closed. She stated that the outer doors were hooked open at the bottom, and he testified they were kept open by the foot plungers. The evidence shows there was a crowd going in and out of the store. Appellee testified that as she and her husband approached the south pair of the outer doors, she was a little ahead of him; that she started in on the right hand side, and a woman coming out of the store forced her over to the center and went between her and her husband; that just at that time the north door of the south pair suddenly swung shut and the horizontal bar hit her in the back, knocking her forward toward / the inner doors, the bars of which she grasped to support herself; that her hands did not touch the door which hit her, and it closed between her and her husband. His testimony corroborates hers. He also testified that ten or fifteen minutes after the accident, the plunger of the door stop was partly down below the bottom of the door, almost dragging, but not touching the floor. None of this testimony was contradicted.

Homer H. Schwartz, an employee of appellant, in charge of the third floor, testified that after the accident, he examined the doors about 1:00 or 1:30 o'clock. He described them and their equipment and operation, as above stated. He stated that the projecting trigger on the door stop is just wide enough to catch with one's

foot and is not right in the lane of customers going in and out; that if some one hit the projection, it might cause the door to close one-quarter of the arc; that "approximately a few minutes" before the injury, he observed this door and at that time it was shut. He testified that when he examined the doors, they opened easily, but did not close quickly, and continued: "With respect to the operation of the door on that day, after you opened it and then let go of it, it would swing free one-quarter of the total arc that was necessary to close, and the rest of the way it was checked in there by the door checks built into the door." He further testified that after examining the doors, he visited appellee at her home and had her fill out a report; that she told him that some one had let go of the door and that it struck her. Appellee denied making the statement. The report she filled out was not introduced in evidence.

Mr. Schwartz further testified that the store manager and assistant manager at the time of the accident were no longer connected with the company and were not in the vicinity to his knowledge. Appellant made no showing of any effort to procure the attendance of either of them as witnesses, or that they were not available. This witness also testified the store had nobody in charge of maintenance, and it was not his duty to look after the doors on the main floor; that the particular doors to his knowledge had been in use ever since the store opened in December, 1937, and he did not know whether they had been in use for a number of years prior to that time or not.

Kenneth Lee, connected with a hardware company, testified that he was familiar with the door holder and door check used on the door of appellant at the time of the accident; that these particular types of door holders and checks have been in use for twenty and twenty-five years respectively, and are the customary and approved types. He

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described their operation in detail. He and Mr. Schwartz are the only witnesses who testified on behalf of appellant. Neither of them nor anyone else testified that either the door holder or the door check was in efficient working condition on the day of the accident, or that either the door holder or door check was ever inspected by or for appellant. It is common knowledge that any mechanical contrivance does not constantly remain in efficient working order, and among those familiar with hydraulic door checks, it is recognized that they need periodical adjustments or repairs. Not only is this true, but in this case, the evidence is that the door swung freely in the first quarter of the closing arc, and was checked only through the remainder of its journey. The evidence is uncontradicted that it swung with such force so that when it came in contact with appellee it knocked her forward toward the inner doors and severely injured her. No door in safe operating condition could do that, whether the closing was caused by the inopportune release of a defective door holder, or from a release of the opened door by another party. If any inspection of the doors had been made, that fact was one peculiarly within appellant's knowledge, and its failure to produce any evidence on that point, gives rise to the presumption that no inspection was ever made. (Belding v. Belding, 358 Ill. 216; Hooper v. Talbot, 343 Id. 590). This presumption is augmented by the testimony that appellant had nobody in charge of maintenance. While a party operating a business to which the public is invited is not an insurer of the safety of patrons, nevertheless, it is his duty to use reasonable care to keep the premises in a reasonably safe condition so that invitees will not be injured by reason of any unsafe condition of the premises, (Devaney v. Otis Elevator Co. 351 Ill. 28; Antibus v. W. T. Grant Co., 297 Ill. App.

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363), and a failure to do so is manifestly actionable negligence where an injury results therefrom.

It is to be noticed that the testimony of appellee and her husband is that the door was propped open by the door holder as they approached it. Nobody is shown to have contacted the door in any manner. If the door stop was in proper working order and the plunger was properly depressed, it would have continued to hold the door open. When appellee's husband inspected it ten or fifteen minutes after the accident, the plunger was depressed a little below the bottom of the door. If the door holder was in operating condition and the trigger had been tripped, the internal spring would have drawn the plunger up. The door holder is not for the use of customers to be operated by them in entering or leaving the store, like the use of doors. It is ⁺facility of the store intended to be exclusively controlled and operated by the management of the store. The fact that the particular door and the other outer doors were all propped open, tends to show they were propped open by appellant or its agent. In so doing, it owed the same duty to its invitees to use reasonable care for their safety, as it did for providing safe equipment. The conclusion is inescapable that the plunger was not sufficiently depressed or that some defect in the door holder prevented it from continuing to hold the door open. A hypothesis that the trigger may have been struck by some passerby is not available to overcome this conclusion, for the reason that if the door holder was in proper operating condition such a contact would have caused the plunger to be retracted, whereas it was partly down. On the subject of intervention by a third party, the ~~Supreme~~ Court of ²³³ Missouri in *Hart v. Emery, Bird, Thayer Dry Goods Co.*, ¹ Mo. app. 312, 118 S.W. 511, said the requirement that the instrumentality be under

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the management and control of the defendant does not mean, or is not limited to, actual physical control, but refers rather to the right of control at the time the negligence was committed; and consequently, the mere possibility that some third person might have been responsible for the negligent condition of the instrumentality causing the injury does not prevent the rule from applying. Practically the same doctrine appears in 45 C. J. 1212, and in *Ven Horn v. Pacific Refining Co.*, 27 Cal. 2d 105, 143 Pac. 951.

The doctrine of *res ipsa loquitur* is, that whenever a thing which produced an injury is shown to have been under the control and management of the defendant, and the occurrence is such as in the ordinary course of events does not happen if due care has been exercised, the fact of injury itself will be deemed to afford *prima facie* evidence to support a recovery in the absence of any explanation by the defendant tending to show that the injury was not due to his want of care. (*Bollenbach v. Bloomenthal*, 341 Ill. 539.) One of the essentials of the doctrine is that it must appear that the one whose negligent act has caused the injury had such control and management over the instrumentality causing the injury that the defendant would be in a better position to explain the cause of the act causing the injury than the person injured, and the burden is cast on the defendant to explain it and show it was not his negligence that caused the injury. (*Wilson v. East St. Louis & Interurban Water Co.*, 295 Ill. App. 603.) In evoking the doctrine, it must appear that the agency causing the accident is solely under the management of the defendant, for if it is partly under the management of the plaintiff, then the doctrine could not be invoked. (*Odum v. Corn Products Ref. Co.*, 173 Ill. App. 348.) In this case, it is clear that the agencies causing the accident were the door check and

the door holder. These were under the exclusive management and control of appellant. The door itself was merely the weapon operated by the two agencies. It was not the cause of the accident. The two instrumentalities which caused the accident and the keeping of the door propped open were under the management and control of appellant. Stringing door cases cited by appellant, have no application here. In those cases, the doors are operated by the public who thus take part in their management and control. No such condition existed here at the time of the accident. In our opinion, the facts in this case bring it within the doctrine of *res ipsa loquitur*. The claim that appellee was bound to show the dangerous condition had existed for such a time that appellant should have notice of it is not available here, where the presumption is that no inspection was ever made by appellant at any time, and the record shows it had no one who was in charge of maintenance. These factors show such negligence as cannot be excused by the claim that the condition may not have been of such duration as to constitute notice. The due care of appellee is not questioned.

Each of appellant's motions imposes the burden upon it of showing that the evidence, taken most strongly in favor of appellee, did not make a prima facie case. Where there is evidence in the record fairly tending to support the allegations of the complaint, the case should be submitted to the jury. All that the evidence tends to prove and all just inferences to be drawn from it in appellee's favor must be taken as true. What is the proximate cause of the injury is ordinarily a question of fact for the jury. (*Holloy v. Chicago Rapid Transit Co.*, 335 Ill. 164.) Even if it be conceded the doctrine of *res ipsa loquitur* does not apply here, the evidence in appellee's

favor was sufficient to require the issues to be submitted to a jury. The testimony in behalf of appellant not only did not overcome the prima facie case, but rather strengthened it. The trial court correctly denied each of these motions of appellant and the judgment will be affirmed.

Judgment affirmed.

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AGENDA NO. 1

IN THE APPELLATE COURT OF ILLINOIS,

SECOND DISTRICT

OCTOBER TERM, 1941.

313 1.A. 259

PEOPLE OF THE STATE OF
ILLINOIS,

Defendant in Error,

vs.

HUGO MATTEI,

Plaintiff in Error.

WRIT OF ERROR TO COUNTY COURT
OF WILL COUNTY.

HUFFMAN - P.J.

Plaintiff in error was convicted in the County Court of Will county upon two counts of an information charging him with violation of certain portions of the Medical Act (Ch. 91, Sec. 16 1, Para. 24). Fine was imposed upon each of the two counts. The defendant has prosecuted this writ of error to reverse the judgments.

The complaining witness was one Charlotte Hermes. She was in the employ of the Department of Registration and Education of the State of Illinois, and designated as an Inspector. She received an assignment to investigate plaintiff in error. Pursuant thereto, she went to his office where she detailed certain pains and bodily afflictions from which she claimed to be suffering. She gave a fictitious name and address. The plaintiff in error proceeded with an examination of the investigator, which was fol-

IN THE COURT OF THE PEOPLE OF THE STATE OF ILLINOIS

At the Court of the People of the State of Illinois

On the 1st day of January, 1908

Plaintiff in Error,	HUGO MATTEI,
Defendant in Error,	vs.
People of the State of Illinois,	Defendant in Error,

HUBMAN - P. 1.

Plaintiff in error was convicted in the County Court of Cook County upon a charge of an unlawful sale of intoxicating liquors in violation of certain provisions of the Illinois Liquor Code, Chapter 11, P. S. 1907, and the defendant has appealed to this Court for reversal of the judgment.

The conviction was based upon the fact that the defendant sold intoxicating liquors to a person who was not of legal age, and the Court found that the defendant was guilty of the crime charged.

The defendant claims that the conviction was based upon an illegal search and seizure of his property, and that the evidence obtained from the search was inadmissible.

The defendant also claims that the Court erred in its judgment of the facts and in its application of the law.

The Court has considered the arguments of both parties and has concluded that the conviction was based upon sufficient evidence and that the Court's judgment was correct.

Therefore, the Court affirms the judgment of the County Court and the defendant's appeal is denied.

lowed by a treatment.

He advertised himself as a practitioner of naprapathy, which is a method of massage. He is a native of Italy, and prior to leaving that country, studied medicine for two years with the view of becoming an officer in the medical corps of the Italian Navy. After coming to this country, he attended an institution in Chicago, where he studied the science of massage, and subsequently engaged in the practice of naprapathy in the City of Joliet.

He administered several treatments to the investigator over a period of time, which involved the acts complained of. It would serve no good purpose to detail the same here. They presented a question of fact to the jury, and if the jury believed them, they constituted the violations as charged. The investigator went to the office of plaintiff in error with a predesigned plan of bringing about the situation which resulted. The jury had the opportunity to pass upon the credibility of the evidence, and the trial court the advantage of seeing and hearing the witnesses. The record has been carefully reviewed. Oral argument was had before the court. In the state of the record, the court does not feel justified in reversing the judgments, and the same are therefore affirmed.

Judgments affirmed.

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AGENDA NO. 3

OCTOBER TERM, 1941. 313 I.A. 260

Plaintiff in Error.

WRIT OF ERROR TO CIRCUIT COURT
OF WILL COUNTY.

HUFFMAN - P.J.

A fine was assessed against the defendant Welch. Plaintiff in error received a fine and jail sentence, from which he prosecutes this writ of error.

The defendant below was charged with conspiracy to obstruct the administration of justice, in that he conspired to corrupt a juror drawn upon the regular panel, which was to try a criminal case then pending against him.

Plaintiff in error assigns four grounds for reversal, namely; that the court erred in excluding proper evidence offered; that the court erred in restricting the examination of the defendants; that the court erred in the matter of instructions, and particularly in the giving of number sixteen; and that the court erred in over-

GEN. NO. 2000

IN THE CIRCUIT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff in Error,
vs.
DENNIS KEENE,
Defendant in Error.

HUFMAN - P.
Prothonotary Public for the County of Cook, Illinois.
appears for the Plaintiff in Error, and in support of the
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ruling motion for new trial. We have carefully read the argument of counsel for plaintiff in error, bearing upon the question of the first two assignments, that the court improperly excluded evidence, and that the court improperly restricted the examination of defendants, as well as the record in reference thereto. We do not perceive wherein plaintiff in error was prejudiced in the above respects, and are not inclined to disturb the judgment upon either of those points.

Instruction number 16 is set out in the brief of plaintiff in error, to which he interposes assignment number three. It has to do with the testimony of an accomplice, and the rule relative thereto. In support of his objection to this instruction, plaintiff in error urges the case of *People v. Rongetti*, 338 Ill. 56, 65. We do not think the jury was prejudiced by the giving of this instruction. It advised them that the law was that the testimony of an accomplice was liable to grave suspicion, and that they should always act upon such testimony with great care and caution, and subject it to careful examination in the light of all the other evidence in the case. We think this duly advised the jury as to the rule and if, under such circumstances, they saw fit to give credibility to such testimony, it was within their province. No argument is made with respect to any other instruction.

The evidence was brief, and presented an issue of fact for the jury, which they have passed upon. This court is not inclined to disturb the verdict.

The judgment is therefore affirmed.

Judgment affirmed.

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AGENDA NO. 32

— 313 L.A. 260²

WALTER JOHNSON, Administrator of
the Estate of Doris Johnson, de-
ceased,

V.

FRANCIS S. McKNIGHT,

Appellant.

APPEAL FROM THE
CIRCUIT COURT OF
MINNEBAGO COUNTY.

DOVE, J.

This appeal is from a judgment of the circuit court of Winnebago County for \$4000.00, rendered on a verdict of a jury, against Francis S. McKnight on account of the death of Doris Johnson who, while riding a bicycle after dark on State Route No. 2, about six or seven miles south of Rockford, was struck by an automobile driven by appellant, and died from her injuries. The suit was against

WALTER JOHNSON
the Estate of
deceased,

FRANCIS S. JOHNSON
WALTER COMPANY, INC.

FRANCIS S. JOHNSON

LOVE, J.

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appellant and Morton Salt Company, whose insignia was on the automobile which appellant was driving at the time of the accident, but this defendant was granted a severance.

The points argued for reversal are that appellee failed to prove the decedent's due care; failed to prove any negligence of appellant; that the trial court erred in the admission and rejection of testimony ^{and} in refusing to allow the jury to take with them an exhibit upon their retirement ^{and} in the giving, modification and refusal of instructions.

State Route No. 2 is a winding road paralleling Rock River. The testimony is not clear as to its exact direction at the place of the accident, but most of the testimony indicates that it runs approximately east and west, curving to the south where the accident occurred. A short distance to the east, a road known as the Prairie Road runs north from the pavement, but does not continue south of it. In the northeast corner of the intersection, about eighty feet east of the Prairie Road, is a filling station and store operated by J. H. Frisk. Directly across from the store is the "Hidden Inn Road" running south. The deceased, a girl of sixteen years, lived at home with her parents, and eight brothers and sisters. All of the brothers and sisters, except one sister eighteen years old, were younger than Doris. The family lived on the north side of State Route No. 2 a short distance west of the Prairie Road. The decedent was a strong, healthy girl of excellent habits. She worked on the farm, milking cows, driving the harvester, loading hay and doing other farm work. She attended high school in the City of Rockford, going from her home and returning on a bicycle, through busy streets, and had ridden a bicycle for six

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or seven years. She was a bright girl, interested in athletic sports and the testimony of disinterested witnesses shows she was a careful person.

About 6:00 P. M. on October 23, 1940, she rode her brother's new bicycle to the Frisk store and purchased matches and crackers. It was quite dark and the lights outside were lighted. The proprietor testified he went out to see the new bicycle and observed, as Doris left, as she rode west, a lighted head light on it; that he last saw her alive as "she was about in the middle of the Prairie Road." This indicates that she was then on the north or right hand side of the road. The point mentioned is about one-third of the way between the store and where she was struck by appellant's car.

Frisk testified that just after he re-entered the store he heard a crash, went to the door and saw appellant's car, stopped at a forty-five degree angle across the road, headed toward the entrance to the Hidden Inn Road, with most of the car on the cement highway; that appellant ran out of the car across the highway to the north, came right back, asked the witness to call an ambulance or a doctor and said he had hit a girl on a bicycle; that appellant was very much excited and said he saw the bicycle, but too late to avoid the accident; and that when appellant came closer after stepping out of the car, the witness saw a red tail light down the hill on the road west, but did not see any car pass him.

The decedent's body and the articles purchased were found in the ditch about fifteen feet north of the pavement and about 180 feet west of the Prairie Road. The bicycle lay about twenty-five feet farther north. The body of the deceased was badly mangled and both bones of the left leg were broken. There was ^a deep laceration of the left

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temple and a deep skull fracture of the left temporal region. She had multiple lacerations and abrasions over the entire body and a deep laceration of the right thigh about ten inches long. She lived about six hours. There was no blood or flesh on the pavement. There was blood over the left side of the car and blood and flesh on the left fender, which was crumpled.

Two deputy sheriffs arrived shortly after the accident. One of them testified appellant told him he did not see the girl and did not know what he had hit; that appellant said he was going home and did not know how fast he was going, but was late, and maybe driving a little faster than usual. The other deputy testified appellant told him he did not see the girl until it was too late to avoid hitting her, and that he did not see any other traffic coming at the time; that the witness heard him say he did not know whether he or the girl was in the right or which side of the road she was on. Both of them testified they used a flash light and saw no skid marks on the pavement; that appellant's car was standing on the pavement, extending out to the middle line, substantially as testified by Frisk; and that about twenty or thirty minutes after they arrived, they moved it off the pavement. A witness for appellant testified the car was in the entrance to the Hidden Inn Road with only a little of it on the highway before the deputies came. Appellant denied making the statements testified to by the deputies, and stated he said he was on the right side of the road near the black line, driving forty-five to fifty miles an hour.

The next morning, between 6:00 and 7:00 o'clock, Frisk and Herbert Warner, a neighbor, examined the pavement. They testified they found black skid marks extending from a point about 170

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to 175 feet west of the Prairie Road in a curve from the north side of the pavement to the place where appellant's car was stopped. Frisk testified the marks came directly to where the car stood. Warner testified the marks went in and made a hole where the front wheels were. The testimony of each of them shows that both skid marks were north of the center line of the pavement for some distance east of the place of the accident.

A statement, written by Albert Krier and signed by Frisk on October 25th was introduced in evidence by appellant to impeach Frisk. The statement recites: "A moment after this crash I saw a tail light on a southbound car going down the hill just south of the intersection just before the northbound car had stopped. There were no skid marks on the pavement. I have read the above and find it to be true." Frisk testified he did not look for skid marks on the night of the accident; that he did not read the statement he signed; that it was read to him and he just signed it, and as far as he could remember he said nothing about skid marks. Krier contradicted a part of the testimony of Frisk, but did not directly testify that Frisk read the statement. It was obvious that if Frisk said anything about skid marks he meant that he saw none that night, and the most charitable view of Krier's testimony is that he misunderstood Frisk. Nobody contradicted the testimony of Frisk and Warner that the marks were there the next morning. It is not shown that the deputies examined the place where the marks appeared, and the fact that they were black may well account for their failure to see them.

Appellant claims the testimony of Frisk and Warner as to seeing the skid marks the next morning was incompetent on the ground that other cars had passed over and stopped on the highway.

to the east of the building... side of the... bed... stood... the front... both... some distance... A... on October... The... a tall... of the... There were... and find... skid marks... statement... it, and... marks. Krier... did not... obvious... that he... Krier's... dictated the... the next... place... may well... to assist... showing...

The contention is untenable. Cars passing in either direction or stopping where appellant's car stood would not make marks of that character. In Kirsch v. Ford, 1 New Series Neg. & Comp. Cases 633, cited by appellant, it was held that testimony was not admissible as to skid marks attributed to a car which did not arrive at the place of the accident until an hour and a half after it occurred, and the car had been removed and other traffic had passed over the highway during the interim. Obviously that case is not persuasive here. Likewise, Cox v. Dreher, 293 Ill. App. 323, holding that skid marks alone were not sufficient to show wilful and wanton conduct, where there was no other evidence to support the charge, is not applicable. Other cases cited by appellant where it is held there can be no recovery where no negligence of the defendant was proven are in the same category. In Pohl v. ~~Wahl~~^{Fang}, 308 Ill. App. 440, where tire marks were not seen until the day after the accident, the court held they were competent evidence. Under the circumstances shown in this case, the testimony as to the tire marks was admissible.

As to the tail light seen by Frisk, as we view the matter, whether he saw it immediately before or after appellant's car stopped, is of no consequence. The claim that a car bearing it might have struck the decedent, throwing her into appellant's path, or that it might have caused her to swerve onto the wrong side of the road is without foundation. The first claim is refuted by the fact that there was no blood on the pavement. The skid marks show appellant's car was on the north side of the center line. If another car was then passing, the result would have been a head on collision between it and appellant's car. If another car had already passed, causing decedent to swerve onto the wrong side of

the pavement, appellant's car would have missed her. Moreover, he he did not deny telling one of the deputies that he saw no other traffic. The logical inference from all the testimony is that if the light Frisk saw was a tail light on a car, the car had passed after the accident without being noticed by appellant in his excitement or by Frisk while he was still in the store. It is also to be observed that the record does not indicate the light was not on a car that might have come onto the pavement after the accident and beyond where it occurred. The testimony as to the light does not tend to show the decedent was not exercising due care or that appellant was not guilty of negligence.

While the burden of proving that decedent was in the exercise of due care for her own safety was upon appellee, that fact need not be established by direct and positive testimony, but may be inferred from all the facts and circumstances shown to exist prior to and at the time of the injury. (Schaffner v. Massey Co., 270 Ill. 207.) Where there is no eye witness to a fatal accident, except the defendant who caused it, and who is consequently incompetent to testify, evidence that the decedent was a careful person is competent on the question of due care. (Young v. Patrick, 323 Ill. 200; Stollery v. Cicero Street Railway Co., 243 id. 290.) By appellant's own admission he was driving at least forty-five to fifty miles per hour on a curve in the dark. There was no blood on the pavement, which strongly indicates that decedent was struck on the north edge of it. Her head light was lighted, and when last seen alive she was on the proper side of the road. She was a careful person. When there is any evidence which, taken with its reasonable inferences in the aspect most favorable to the

plaintiff, tends to show the exercise of due care on the part of the deceased, the question of due care is one for the jury. Whether there is any such evidence is a question of law. (Dee v. City of Peru, 343 Ill. 36.) Manifestly there was evidence in this case which required the question of due care to be submitted to the jury and when all of the testimony is considered, the conclusion that the verdict is not against the manifest weight of the evidence is inescapable.

Another contention that is without merit is that the court committed reversible error in permitting the witness Smith to testify to an excessive speed of appellant's car five minutes before the accident. At the close of the testimony for appellee, the court informed the jury the testimony was stricken and orally instructed them to disregard it entirely. The same direction to disregard stricken testimony was repeated in the written instructions. The court also refused to permit another occupant of Smith's car to testify to the same fact. Under all these circumstances and the repeated instructions of the court, there was no prejudice to defendant (Chicago & Grand Trunk Railway Co. v. Gasinowski, 156 Ill. 189.)

Appellee's exhibit 7, a photograph of the left side of appellant's car jacked up in a garage with the left front wheel removed, was admitted in evidence over objection that the car was not in the same condition as when the accident happened. It is not claimed the car was not in the same condition except that the wheel had been removed. Removing the wheel would not change the appearance of the fender or the side of the car, the condition of which, showing the blood and flesh, was the only purpose for which the exhibit was introduced. There was no prejudice to appellant in admitting this photograph in evidence.

Refusing to allow the jury to take the written statement of Frisk to the jury room was not error. It contained statements upon

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which it was not sought to impeach him and upon which there was no testimony. It was not read in evidence, and therefore is not within the terms of section 67 of the Civil Practice Act. (People v. Clark, 301 Ill. 428 (432.) The practice of allowing such papers to be taken by the jury was condemned in Whitney v. Whitman, 5 Mass. 404, and Page v. Wheeler, 3 N. H. 91, cited with approval in Rawson v. Curtis, 19 Ill. 456 (482-3).

Appellant called the mother of decedent as an adverse witness under section 60 of the Civil Practice Act. She testified that at the coroner's inquest she stated that soon after decedent left to go to the store, one of the other children said Doris had been hurt; that she did not give it much thought as she had fallen off the bicycle so many times and hurt her knee, and she thought it was just another one of those bumps. On cross-examination, she testified that Doris had ridden a bicycle six or seven years, and fell off sometimes as every child does; that she rode to the Rockford high school "right through the main street" because there were no hills; and that she was a good bicycle rider. Appellant ^{claims} ~~contends~~ that this qualified him as an occurrence witness. Section 2 of the Evidence act provides:

"No party to any civil action *** shall be allowed to testify of his own motion, or in his own behalf *** when any adverse party sues or defends as the executor, administrator, heir, legatee or devisee *** of any deceased person, unless when called as a witness by such adverse party so suing or defending, and also except in the following cases, namely: ***

Third: when in any such action, suit or proceeding, any such party suing or defending, as aforesaid, or any persons having a direct interest in the event of such action, suit or proceeding, shall testify in behalf of such party so suing or defending, to any conversation or transaction with the opposite party or parties in interest, then such opposite party or parties in interest shall also be permitted to testify as to the same conversation or transaction."

In the first place, decedent's mother did not testify to "any conversation or transaction" with the opposite party. In

IN REASON V. REASON, 1911, 1912, 1913, 1914, 1915, 1916, 1917, 1918, 1919, 1920, 1921, 1922, 1923, 1924, 1925, 1926, 1927, 1928, 1929, 1930, 1931, 1932, 1933, 1934, 1935, 1936, 1937, 1938, 1939, 1940, 1941, 1942, 1943, 1944, 1945, 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025, 2026, 2027, 2028, 2029, 2030, 2031, 2032, 2033, 2034, 2035, 2036, 2037, 2038, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2047, 2048, 2049, 2050, 2051, 2052, 2053, 2054, 2055, 2056, 2057, 2058, 2059, 2060, 2061, 2062, 2063, 2064, 2065, 2066, 2067, 2068, 2069, 2070, 2071, 2072, 2073, 2074, 2075, 2076, 2077, 2078, 2079, 2080, 2081, 2082, 2083, 2084, 2085, 2086, 2087, 2088, 2089, 2090, 2091, 2092, 2093, 2094, 2095, 2096, 2097, 2098, 2099, 2100, 2101, 2102, 2103, 2104, 2105, 2106, 2107, 2108, 2109, 2110, 2111, 2112, 2113, 2114, 2115, 2116, 2117, 2118, 2119, 2120, 2121, 2122, 2123, 2124, 2125, 2126, 2127, 2128, 2129, 2130, 2131, 2132, 2133, 2134, 2135, 2136, 2137, 2138, 2139, 2140, 2141, 2142, 2143, 2144, 2145, 2146, 2147, 2148, 2149, 2150, 2151, 2152, 2153, 2154, 2155, 2156, 2157, 2158, 2159, 2160, 2161, 2162, 2163, 2164, 2165, 2166, 2167, 2168, 2169, 2170, 2171, 2172, 2173, 2174, 2175, 2176, 2177, 2178, 2179, 2180, 2181, 2182, 2183, 2184, 2185, 2186, 2187, 2188, 2189, 2190, 2191, 2192, 2193, 2194, 2195, 2196, 2197, 2198, 2199, 2200, 2201, 2202, 2203, 2204, 2205, 2206, 2207, 2208, 2209, 2210, 2211, 2212, 2213, 2214, 2215, 2216, 2217, 2218, 2219, 2220, 2221, 2222, 2223, 2224, 2225, 2226, 2227, 2228, 2229, 2230, 2231, 2232, 2233, 2234, 2235, 2236, 2237, 2238, 2239, 2240, 2241, 2242, 2243, 2244, 2245, 2246, 2247, 2248, 2249, 2250, 2251, 2252, 2253, 2254, 2255, 2256, 2257, 2258, 2259, 2260, 2261, 2262, 2263, 2264, 2265, 2266, 2267, 2268, 2269, 2270, 2271, 2272, 2273, 2274, 2275, 2276, 2277, 2278, 2279, 2280, 2281, 2282, 2283, 2284, 2285, 2286, 2287, 2288, 2289, 2290, 2291, 2292, 2293, 2294, 2295, 2296, 2297, 2298, 2299, 2300, 2301, 2302, 2303, 2304, 2305, 2306, 2307, 2308, 2309, 2310, 2311, 2312, 2313, 2314, 2315, 2316, 2317, 2318, 2319, 2320, 2321, 2322, 2323, 2324, 2325, 2326, 2327, 2328, 2329, 2330, 2331, 2332, 2333, 2334, 2335, 2336, 2337, 2338, 2339, 2340, 2341, 2342, 2343, 2344, 2345, 2346, 2347, 2348, 2349, 2350, 2351, 2352, 2353, 2354, 2355, 2356, 2357, 2358, 2359, 2360, 2361, 2362, 2363, 2364, 2365, 2366, 2367, 2368, 2369, 2370, 2371, 2372, 2373, 2374, 2375, 2376, 2377, 2378, 2379, 2380, 2381, 2382, 2383, 2384, 2385, 2386, 2387, 2388, 2389, 2390, 2391, 2392, 2393, 2394, 2395, 2396, 2397, 2398, 2399, 2400, 2401, 2402, 2403, 2404, 2405, 2406, 2407, 2408, 2409, 2410, 2411, 2412, 2413, 2414, 2415, 2416, 2417, 2418, 2419, 2420, 2421, 2422, 2423, 2424, 2425, 2426, 2427, 2428, 2429, 2430, 2431, 2432, 2433, 2434, 2435, 2436, 2437, 2438, 2439, 2440, 2441, 2442, 2443, 2444, 2445, 2446, 2447, 2448, 2449, 2450, 2451, 2452, 2453, 2454, 2455, 2456, 2457, 2458, 2459, 2460, 2461, 2462, 2463, 2464, 2465, 2466, 2467, 2468, 2469, 2470, 2471, 2472, 2473, 2474, 2475, 2476, 2477, 2478, 2479, 2480, 2481, 2482, 2483, 2484, 2485, 2486, 2487, 2488, 2489, 2490, 2491, 2492, 2493, 2494, 2495, 2496, 2497, 2498, 2499, 2500, 2501, 2502, 2503, 2504, 2505, 2506, 2507, 2508, 2509, 2510, 2511, 2512, 2513, 2514, 2515, 2516, 2517, 2518, 2519, 2520, 2521, 2522, 2523, 2524, 2525, 2526, 2527, 2528, 2529, 2530, 2531, 2532, 2533, 2534, 2535, 2536, 2537, 2538, 2539, 2540, 2541, 2542, 2543, 2544, 2545, 2546, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559, 2560, 2561, 2562, 2563, 2564, 2565, 2566, 2567, 2568, 2569, 2570, 2571, 2572, 2573, 2574, 2575, 2576, 2577, 2578, 2579, 2580, 2581, 2582, 2583, 2584, 2585, 2586, 2587, 2588, 2589, 2590, 2591,

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the second place, the witness was never at any time called in her own behalf or in behalf of appellee as to the habits or carefulness of the decedent. It is obvious that the exception in paragraph 2 was not designed to permit one party to call an adverse party for the purpose of opening up a question in order to enable the party calling the witness to testify concerning the question.

Such a practice would in effect nullify the first part of the section. The exception in the third paragraph plainly means only that when an interested party testifies in his own behalf, that is, takes the witness stand of his own motion, as to any conversation or transaction with the opposite party, then the bar is removed from such opposite party as to such conversation or transaction. Express exceptions are not to be construed as embracing anything beyond their terms. Appellant was not a competent occurrence witness. (*Combs v. Young*, 281 Ill. App. 339.)

An instruction is complained of that told the jury:

"The law presumes such kinsmen (father, mother, brothers and sisters) have sustained some substantial damages from the fact of their relationship alone and the death of Doris Johnson." There is such a presumption as to parents or lineal next of kin. (*City of Chicago v. Hesing*, 83 Ill. 204; *Grace & Hyde v. Strong*, 127 Ill. App. 336; *Wilcox v. Bierd*, 330 Ill. 571.) The presumption does not extend to collaterals. (*Frankov. Crosby*, 278 Ill. App. 416.) When all the next of kin are collaterals and they have not received pecuniary aid from the decedent, only nominal damages are recoverable. (*Roads v. Chicago and Alton Railroad Co.*, 227 Ill. 328.) In a death case, such as this, there is no separation of damages to be assessed by the jury. The verdict and judgment are for one gross amount, irrespective of the number of the next of kin. (*Garnhart v. Reeves*, 283 Ill. App. 159.) In *Grace & Hyde v. Strong*, *supra*, the decedent left surviving

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him, his parents and fourteen brothers and sisters. On appeal to the Supreme Court (224 Ill. 630) it was contended the verdict and judgment for \$2000.00 was unwarranted because the evidence showed the deceased was contributing only to the support of his father and mother. The court said of this contention: "As there ^{was} ~~is~~ evidence tending to show that some, at least, of the next of kin of deceased had sustained a pecuniary loss by his death it cannot be said that no more than nominal damages could be allowed," and the judgment was affirmed. In this case, in addition to the presumption in favor of the parents, the evidence shows that decedent, by her farm labor, was contributing to the support of the family. While the instruction was not technically accurate, appellant suffered no prejudice from it. Other instructions told the jury that pecuniary loss in the measure of damages.

Another instruction was in the language of section 70 of the Injuries Act, which provides that the jury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death, to the next of kin of such deceased persons, not exceeding the sum of \$10,000.00. The claim that it is erroneous for the same reason as an instruction in Baker & Reddick v. Summers, 201 Ill. 52, cannot be upheld. In that case the court gave an instruction substantially in the words of the Dram Shop Act, stating the liability to be for all damages sustained, "and in this case not exceeding the sum of \$5000.00." The court held the instruction was erroneous in substantially telling the jury the defendants were liable for the damages ^{sustained} ~~not~~ exceeding the sum of \$5000.00, without proof of the necessary facts, and merely because the statute provided for a liability. The instruction in the case at bar was not of the peremptory character of that instruction. It made no reference to this case, but was

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merely in the language of the Statute. Not being of a peremptory nature it was unnecessary that it include all the elements for a recovery. In Scally v. Flannery, 292 Ill. App. 349, an instruction was condemned which told the jury that certain rates of speed are by statute made prima facie evidence that the driver was travelling at a rate not reasonable and proper, because the matter of speed was one of the prime questions in the case. Neither of those cases is controlling here. An instruction repeating verbatim a section of the statute, even though, in itself, misleading, does not require a reversal of the judgment, where, as here, other instructions specifically stating the law applicable to the facts appear in the record. (People v. ^{Schymmer,} ~~Moore~~, 374 Ill. 292; White v. People 179 id. 356.) Giving an instruction in the language of the statute under circumstances similar to this case, is not error. (Deming v. Chicago, 321 Ill. 341.) Complaint is made as to the modification of other instructions by omitting reference to pecuniary benefits and due care of plaintiff's intestate. The matter omitted is covered by other given instructions.

While it seems inevitable that minor errors will creep into every contested trial, such errors are not sufficient for reversal where there has been a fair trial and substantial justice has been done. We find no reversible error in the record. The judgment of the circuit court is therefore affirmed.

Judgment affirmed.

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AT A TERM OF THE APPELLATE COURT,

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HON. FRANKLIN R. DOVE, Justice

JUSTUS L. JOHNSON, Clerk

315 I.A. 260³

BE IT REMEMBERED, that afterwards, to-wit: On ~~the~~ ^{the} ~~modified and amended~~ ^{the} Opinion of the Court was filed in the Clerk's Office of said Court, in the words and figures following, viz:

1. The first part of the paper is devoted to a general discussion of the problem.

2. In the second part, we shall consider the case of a single particle in a magnetic field.

3. The third part is devoted to the case of a system of particles in a magnetic field.

4. The fourth part is devoted to the case of a system of particles in a magnetic field.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

October Term, A. D. 1941

WALTER JOHNSON, Administrator
of the Estate of Doris Johnson,
Deceased,

Appellee

vs

FRANCIS McKNIGHT and MORTON SALT
CO., a corporation,

Appellants

Appeal from
Circuit Court,
Winnebago County.

DOVE, J:

This appeal is from a judgment of the circuit court of Winnebago county for \$4,000.00, rendered on a verdict of a jury, against Francis S. McKnight on account of the death of Doris Johnson, who, while riding a bicycle after dark on State Route No. 2, about six or seven miles south of Rockford, was struck by an automobile driven by appellant, and died from her injuries. The suit was against appellant and Morton Salt Company, whose insignia was on the automobile which appellant was driving at the time of the accident, but this defendant was granted a severance.

The points argued for reversal are that appellee failed to prove the decedent's due care; failed to prove any negligence of appellant; that the trial court erred in the admission and rejection of testimony and in refusing to allow the jury to take with them an exhibit upon their retirement and in the giving, modification and refusal of instructions.

State Route No. 2 is a winding road paralleling Rock River. The testimony is not clear as to its exact direction at the place of the accident, but most of the testimony indicates that it runs approx-

imately east and west, curving to the south where the accident occurred. A short distance to the east, a road known as the Prairie Road runs north from the pavement, but does not continue south of it. In the northeast corner of the intersection, about eighty feet ~~xx~~ east of the Prairie Road, is a filling station and store operated by J. H. Frisk. Directly across from the store is the "Hidden Inn Road" running south. The deceased, a girl of sixteen years, lived at home with her parents, and eight brothers and sisters. All of the brothers and sisters, except one sister eighteen years old, were younger than Doris. The family lived on the north side of State Route No. 2 a short distance west of the Prairie Road. The decedent was a strong, healthy girl of excellent habits. She worked on the farm, milking^K cows, driving the harvester, loading hay and doing other farm work. She attended high school in the City of Rockford, going from her home and returning on a bicycle, through busy streets, and had ridden a bicycle for six or seven years. She was a bright girl, interested in athletic sports and the testimony of disinterested witnesses shows she was a careful person.

About 6:00 P.M. on October 23, 1940, she rode her brother's new bicycle to the Frisk store and purchased matches and crackers. It was quite dark and the lights outside were lighted. The proprietor testified he went out to see the new bicycle and observed, as Doris left, as she rode west, a lighted headlight on it; that he last saw her alive as "she was about/ⁱⁿthe middle of the Prairie Road." This indicates that she was then on the north or right hand side of the road. The point mentioned is about one-third of the way between the store and where she was struck by appellant's car.

Frisk testified that just after he re-entered the store he heard a crash, went to the door and saw appellant's car, stopped at a forty-five degree angle across the road, headed toward the entrance to the Hidden Inn Road, with most of the car on the cement highway; that appellant ran out of the car across the highway to the north, came right back, asked the witness to call an ambulance or a doctor and said he had hit a girl on a bicycle; that appellant was very much excited and said he saw the bicycle, but too late to avoid the accident; and

that when appellant came closer after stepping out of the car, the witness saw a red tail light down the hill on the road west, but did not see any car pass him.

The decedent's body and the articles purchased were found in the ditch about fifteen feet north of the pavement and about 180 feet west of the Prairie Road. The bicycle lay about twenty-five feet farther north. The body of the deceased was badly mangled and both bones of the left leg were broken. There was a deep laceration of the left temple and a deep skull fracture of the left temporal region. She had multiple lacerations and abrasions over the entire body and a deep laceration of the right thigh about ten inches long. She lived about six hours. There was no blood or flesh on the pavement. There was blood over the left side of the car and blood and flesh on the left fender, which was crumpled.

Two deputy sheriffs arrived shortly after the accident. One of them testified appellant told him he did not see the girl and did not know what he had hit; that appellant said he was going home and did not know how fast he was going, but was late, and maybe driving a little faster than usual. The other deputy testified appellant told him he did not see the girl until it was too late to avoid hitting her, and that he did not see any other traffic coming at the time; that the witness heard him say he did not know whether he or the girl was in the right or which side of the road she was on. Both of them testified they used a flash light and saw no skid marks on the pavement; that appellant's car was standing on the pavement, extending out to the middle line, substantially as testified by Frisk; and that about twenty or thirty minutes after they arrived, they moved it off the pavement. A witness for appellant testified the car was in the entrance to the Hidden Inn Road with only a little of it on the highway before the deputies came. Appellant denied making the statements testified to by the deputies, and stated he said he was on the right side of the road near the black line, driving forty-five to fifty miles an hour.

The next morning, between 6:00 and 7:00 o'clock, Frisk and Herbert Warner, a neighbor, examined the pavement. They testified they found

black skid marks extending from a point about 170 to 175 feet west of the Prairie Road in a curve from the north side of the pavement to the place where appellant's car was stopped. Frisk testified the marks came directly to where the car stood. Warner testified the marks went in and made a hole where the front wheels were. The testimony of each of them shows that both skid marks were north of the center line of the pavement for some distance east of the place of the accident.

A statement, written by Albert Krier and signed by Frisk on October 25th was introduced in evidence by appellant to impeach Frisk. The statement recites: "A moment after this crash I saw a tail light on a southbound car going down the hill just south of the intersection just before the northbound car had stopped. There were no skid marks on the pavement. I have read the above and find it to be true." Frisk testified he did not look for skid marks on the night of the accident; that he did not read the statement he signed; that it was read to him and he just signed it, and as far as he could remember he said nothing about skid marks. Krier contradicted a part of the testimony of Frisk, but the abstract does not show he testified that Frisk read the statement. It was obvious that if Frisk said anything about the skid marks he meant that he saw none that night, and the most charitable view of Krier's testimony is that he misunderstood Frisk. Nobody contradicted the testimony of Frisk and Warner that the marks were there the next morning. It is not shown that the deputies examined the place where the marks appeared, and the fact that they were black may well account for their failure to see them.

Appellant claims the testimony of Frisk and Warner as to seeing the skid marks the next morning was incompetent on the ground that other cars had passed over and stopped on the highway. The contention is untenable. Cars passing in either direction or stopping where appellant's car stood would not make marks of that character.

In *Kirsch v. Ford*, 1 New Series Negligence and Compensation Cases, 633, and *Marine v. Stewart*, 165 Md. 698, 168 At. 891, relied upon by appellant, where the witness in each case was interrogated as to skid marks observed some time after the accident, and traffic had passed

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apparent, the photograph shows the train
marks observed on the street.

over the spot meanwhile, the offer of the testimony was excluded as improper, and we think properly so, because the skid marks were in line with the line of the traffic, and not, as here, curving across it from the left side of the pavement. Neither of those cases is in point. Likewise, *Cox v. Dreher*, 293 Ill. App. 323, holding that skid marks alone were not sufficient to show wilful and wanton conduct, where there was no other evidence to support the charge, is not applicable. Other cases cited by appellant where it is held there can be no recovery where no negligence of the defendant was shown are in the same category.

The weight of authority is that evidence of skid marks seen by witnesses some time after the accident is not incompetent, but the weight of such testimony is for the jury. In the following cases, the testimony was held admissible: *Stutzman v. Younkerman*, 204 Iowa, 1162, 216 N.W. 627 (Five hours by one witness, twelve hours by another); *Flach v. Fikes*, 204 Cal. 329, 267 Pac. 1079 (four or five hours with no great amount of travel, but on a business street); *Tomasko v. Rauceri*, 113 Conn. 274, 156 At. 64 (One hour by one witness, and the next morning by another); *Still v. Swanson* (Wash.) 27 Pac. (2d) 704 (One witness the next morning and one witness the second morning); In three cases, *Bowker v. Illinois Electric Co.*, 112 Cal. App. 740, 297 Pac. 615; *Meier v. Wagner*, 27 Cal. App. 579, 150 Pac. 797; and *Carson v. Turrish*, 140 Minn. 445, 168 N.W. 349, the skid marks were seen by the witnesses the next morning. In *Wallace v. Kramer* (Mich.) 296 N.W. 838, photographs of skid marks twelve days after the accident were held admissible. The *Stutzman* case, the *Flach* case and the *Still* case each holds that the weight of the testimony is for the jury. Under the circumstances shown in this case, the testimony as to the tire marks was admissible.

As to the tail light seen by Frisk, as we view the matter, whether he saw it immediately before or after appellant's car stopped, is of no consequence. The claim that a car bearing it might have struck the decedent, throwing her into appellant's path, or that it might have caused her to swerve onto the wrong side of the road is without foundation. The first claim is refuted by the fact that there was no blood on the pavement. The skid marks show appellant's car was on the north side of

the center line. If another car was then passing, the result would have been a head on collision between it and appellant's car. If another car had already passed, causing decedent to swerve onto the wrong side of the pavement, appellant's car would have missed her. Moreover, he did not deny telling one of the deputies that he saw no other traffic. The logical inference from all the testimony is that if the light Frisk saw was a tail light on a car, the car had passed after the accident without being noticed by appellant in his excitement or by Frisk while he was still in the store. It is also to be observed that the record does not indicate the light was not on a car that might have come onto the pavement after the accident and beyond where it occurred. The testimony as to the light does not tend to show the decedent was not exercising due care or that appellant was not guilty of negligence.

While the burden of proving that decedent was in the exercise of due care for her own safety was upon appellee, that fact need not be established by direct and positive testimony, but may be ~~if~~ inferred from all the facts and circumstances shown to exist prior to and at the time of the injury. (*Schaffner v. Massey Co.*, 270 Ill. 207). Where there is no eye witness to a fatal accident, except the defendant who caused it, and who is consequently incompetent to testify, evidence that the decedent was a careful person is competent on the question of due care. (*Young v. Patrick*, 323 Ill. 200; *Stollery v. Cicero Street Railway Co.*, 243 id. 290). By appellant's own admission he was driving at least forty-five to fifty miles per hour on a curve in the dark. There was no blood on the pavement, which strongly indicates that decedent was struck on the north edge of it. Her head light was lighted, and when last seen alive she was on the proper side of the road. She was a careful person. When there is any evidence which, taken with its reasonable inferences in the aspect most favorable to the plaintiff, tends to show the exercise of due care on the part of the deceased, the question of due care is one for the jury. Whether there is any such evidence is a question of law. (*Dee v. City of Peru*, 343 Ill. 36.) Manifestly there was evidence in this case which required the question of due care to be submitted to the jury and when all of the testimony is considered, the conclusion that the verdict is not against the manifest weight of the

the center line. It is not a road, it is a
been a head on collision. It is not a road, it is a
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(Young v. ...), and it is not a road, it is a
243 id. 200), and it is not a road, it is a
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no blood on the road, and it is not a road, it is a
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conclusion that it is not a road, it is a

evidence is inescapable.

Another contention that is without merit is that the court committed reversible error in permitting the witness Smith to testify to an excessive speed of appellant's car five minutes before the accident. At the close of the testimony for appellee, the court informed the jury the testimony was stricken and orally instructed them to disregard it entirely. The same direction to disregard stricken testimony was repeated in the written instructions. The court also refused to permit another occupant of Smith's car to testify to the same fact. Under all these circumstances and the repeated instructions of the court, there was no prejudice to defendant. (*Chicago & Grand Trunk Railway Co. v. Gaeinowski*, 155 Ill.189; (*People v. Hansen*, 378 Ill. 491, (499-500)).

Appellee's exhibit 7, a photograph of the left side of appellant's car jacked up in a garage with the left front wheel removed, was admitted in evidence over objection that the car was not in the same condition as when the accident happened. It is not claimed the car was not in the same condition except that the wheel had been removed. Removing the wheel would not change the appearance of the fender or the side of the car, the condition of which, showing the blood and flesh, was the only purpose for which the exhibit was introduced. There was no prejudice to appellant in admitting this photograph in evidence.

Refusing to allow the jury to take the written statement of Frisk to the jury room was not error. It contained statements upon which it was not sought to impeach him and upon which there was no testimony. It was not read in evidence, and therefore is not within the terms of section 67 of the Civil Practice Act. (*People v. Clark*, 301 Ill. 428 (432). The practice of allowing such papers to be taken by the jury was condemned in *Whitney v. Whitman*, 5 Mass. 404, and *Page v. Wheeler*, 5 N.R. 91, cited with approval in *Rawson v. Curtis*, 19 Ill. 456 (482-3).

Appellant called the mother of decedent as an adverse witness under section 60 of the Civil Practice Act. She was asked whether the bicycle Doris was riding at the time of the accident was brand new, purchased that day for her brother, whether it was the first time she had ridden it; and whether she often fell off this bicycle. Upon her negative reply to

the last question she was asked if she did not testify at the coroner's inquest that soon after the decedent left to go to the store, one of the other children said Doris had been hurt; that she did not give it much thought as she had fallen off the bicycle so many times and hurt her knee, and she thought it was just another one of those bumps. She replied that she supposed she said it if it was written down. On cross-examination, she testified that Doris had ridden a bicycle six or seven years, and fell off sometimes as every child does; that she rode to the Rockford high school "right through the main street" because there were no hills; and that she was a good bicycle rider. Appellant claims the cross-examination was improper, and that this qualified him as an occurrence witness. The manifest purpose of the direct examination was an attempt to show the decedent was not a careful person and not a good bicycle rider. The cross-examination was directly in line with the examination in chief and was not improper. Section 2 of the Evidence act provides:

"No party to any civil action * * * shall be allowed to testify of his own motion, or in his own behalf * * * when any adverse party sues or defends as the executor, administrator, heir, legatee or devisee * * * of any deceased person, unless when called as a witness by such adverse party so suing or defending, and also except in the following cases, namely:

THIRD: When in any such action, suit or proceeding, any such party suing or defending, as aforesaid, or any persons having a direct interest in the event of such action, suit or proceeding, shall testify in behalf of such party so suing or defending, to any conversation or transaction with the opposite party or parties in interest, then such opposite party or parties in interest shall also be permitted to testify as to the same conversation or transaction."

In the first place, decedent's mother did not testify to "any conversation or transaction" with the opposite party. In the second place, the witness was never at any time called in her own behalf or in behalf of appellee as to the habits or carefulness of the decedent. It is obvious that the exception in paragraph 2 was not designed to permit one party to call an adverse party for the purpose of opening up a question in order to enable the party calling the witness to testify concerning the question or to qualify him as an occurrence witness.

The first question she was asked at the trial was whether or not she was
indignant that soon after the execution of the condemned man, she saw of the
other children and she said she was indignant; but she did not give it any
thought as she was not a child and she was not a woman and she was not a
and she thought it was just another thing and she did not think of it
she supposed she said it in a matter of fact and she did not think of it
she testified that she did not think of it in a matter of fact and she did not
all sometimes we are not thinking of things and we are not thinking of things
school "right thinking" and she said she was not thinking of it and she
that she was a good biological child and she was not thinking of it and she
was improper, and she said she was not thinking of it and she was not
manifest purpose of the child and she was not thinking of it and she was
descendant was not a child and she was not thinking of it and she was
examination was directly to the child and she was not thinking of it and she was
not improper. Section 1 of the Evidence Code provides:

"It is the duty of the jury to determine whether or not the evidence
allowed to testify to the fact of the child's death, and if so, whether or not
the child was a child of the deceased, and if so, whether or not the child was
legally or factually a child of the deceased, and if so, whether or not the child was
unlawful when killed, and if so, whether or not the child was a child of the
party to the crime, and if so, whether or not the child was a child of the
the following cases, namely:

THIRD: When the child was a child of the deceased, and if so, whether or not
the child was a child of the deceased, and if so, whether or not the child was
or any other person who was a child of the deceased, and if so, whether or not
of such person, and if so, whether or not the child was a child of the deceased,
benefit of such person, and if so, whether or not the child was a child of the deceased,
conviction of such person, and if so, whether or not the child was a child of the deceased,
or parties in interest, and if so, whether or not the child was a child of the deceased,
parties in interest, and if so, whether or not the child was a child of the deceased,
ly as to the same person, and if so, whether or not the child was a child of the deceased,

In the first place, the child's father was a child of the deceased,
conversation of the deceased, and if so, whether or not the child was a child of the deceased,
the witness was never asked any question as to whether or not the child was a child of the deceased,
of appellee as to the child's death, and if so, whether or not the child was a child of the deceased,
obvious that the exception in this case was a child of the deceased,
one party to a crime was a child of the deceased, and if so, whether or not the child was a child of the deceased,
question in order to enable the party to whom the child was a child of the deceased,
concerning the fact that the child was a child of the deceased.

Such a practice would in effect nullify the first part of the section. The exception in the third paragraph plainly means only that when an interested party testifies in his own behalf, that is, takes the witness stand of his own motion, as to any conversation or transaction with the opposite party, then the bar is removed from such opposite party as to such conversation or transaction. Express exceptions are not to be construed as embracing anything beyond their terms. Appellant was not a competent occurrence witness. (Combs v. Younge, 281 Ill. App. 339) Rouse v. Tomaseck, 279 Ill. App. 557, relied upon by appellant, is not in point. In that case the plaintiff took the stand of his own motion and testified to the careful habits of the decedent.

An instruction is complained of that told the jury: "The law presumes such kinsman (father, mother, brothers and sisters) have sustained some substantial damages from the fact of their relationship alone and the death of Doris Johnson." There is such a presumption as to parents or lineal next of kin. (City of Chicago v. Hesing, 83 Ill. 204; Grace & Hyde v. Strong, 127 Ill. App. 336; Wilcox v. Bierd, 330 Ill. 571.) The presumption does not extend to collaterals. (Franko v. Crosby, 278 Ill. App. 416) When all the next of kin are collaterals and they have not received pecuniary aid from the decedent, only nominal damages are recoverable. (Rhoads v. Chicago and Alton Railroad Co., 227 Ill. 328). In a death case, such as this, there is no separation of damages to be assessed by the jury. The verdict and judgment are for one gross amount, irrespective of the number of the next of kin. (Garnhart v. Reeves, 288 Ill. App. 159). In Grace & Hyde v. Strong, supra, the decedent left surviving him, his parents and fourteen brothers and sisters. On appeal to the Supreme Court (224 Ill. 630) it was contended the verdict and judgment of \$2,000.00 was unwarranted because the evidence showed the deceased was contributing only to the support of his father and mother. The court said of this contention: "As there was evidence tending to show that some, at least, of the next of kin of deceased had sustained a pecuniary loss by his death it cannot be said that no more than nominal damages could be allowed," and the judgment was affirmed. In this case, in addition to the presumption in favor of the parents, the evidence shows that

decedent, by her farm labor, was contributing to the support of the family. While the instruction was not technically accurate, appellant suffered no prejudice from it. Other instructions told the jury that pecuniary loss in the measure of damages.

Another instruction was in the language of section 70 of the Injuries Act, which provides that the jury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death, to the next of kin of such deceased persons, not exceeding the sum of \$10,000.00. The claim that it is erroneous for the same reason as an instruction in *Baker & Reddick v. Summers*, 201 Ill. 52, cannot be upheld. In that case the court gave an instruction substantially in the words of the Dram Shop Act, stating the liability to be for all damages sustained, "and in this case not exceeding the sum of \$5,000.00." The court held the instruction was erroneous in substantially telling the jury the defendants were liable for the damages sustained not exceeding the sum of \$5,000.00, without proof of the necessary facts, and merely because the statute provided for a liability. The instruction in the case at bar was not of the peremptory character of that instruction. It made no reference to this case, but was merely in the language of the Statute. Not being of a peremptory nature it was unnecessary that it include all the elements for a recovery. In *Scally v. Flannery*, 292 Ill. App. 349, an instruction was condemned which told the jury that certain rates of speed are by statute made prima facie evidence that the driver was travelling at a rate not reasonable and proper because the matter of speed was one of the prime questions in the case. Neither of those cases is controlling here. An instruction repeating verbatim a section of the statute, even though, in itself, misleading, does not require a reversal of the judgment, where, as here, other instructions specifically stating the law applicable to the facts appear in the record. (*People v. Schymen*, 374 Ill. 292; *White v. People*, 179 id. 356). Giving an instruction in the language of the statute under circumstances similar to this case, is not error. (*Reming v. Chicago*, 321 Ill. 341.) Complaint is made as to the modification of other instructions by omitting reference to pecuniary

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family. While the institution of a declaration, a
suffered no injuries from it. The institution of a
pecuniary loss in the institution of the law.

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erroneous for the law of the law, a
Summers, 211 N. E. 2d, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000

benefits and due care of plaintiff's intestate. The matter omitted is covered by other given instructions.

While it seems inevitable that minor errors will creep into every contested trial, such errors are not sufficient for reversal where there has been a fair trial and substantial justice has been done. We find no reversible error in the record. The judgment of the Circuit Court is therefore affirmed.

Judgment affirmed.

benefits to the community.

... ..

the Circuit Court at New Orleans.
done; the law has been followed.

where there have been no other trials
every collected in the past year

"While it was true that the trial had been held in the city of New Orleans, it was also true that the trial had been held in the city of New Orleans."

STATE OF ILLINOIS, }
SECOND DISTRICT } ss.

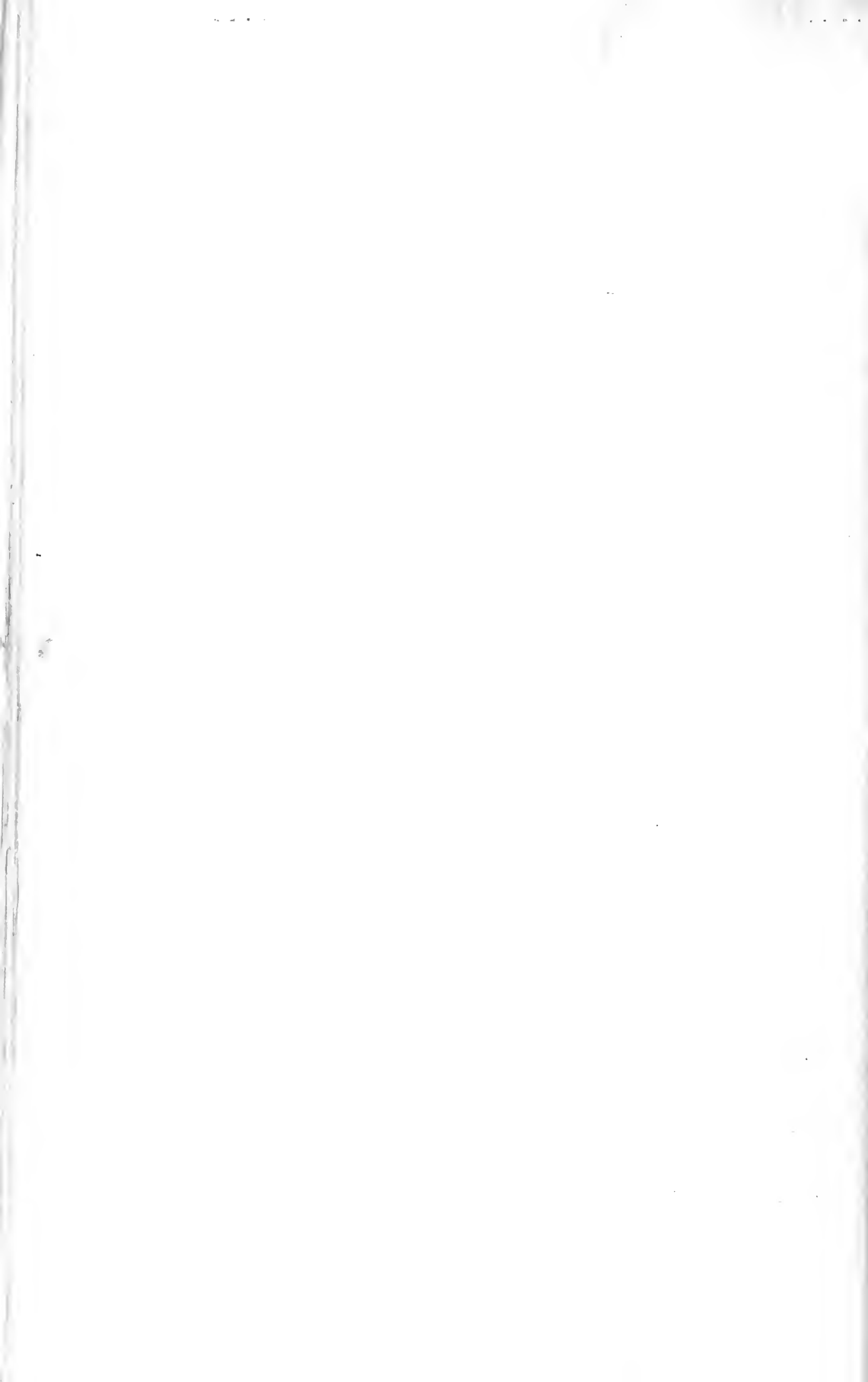
I, JUSTUS L. JOHNSON, Clerk of the Appellate Court,
in and for said Second District of the State of Illinois, and the keeper of the Records and Seal
thereof, do hereby certify that the foregoing is a true copy of the _____

opinion

of the said Appellate Court in the above entitled cause, of record in my office.

In Testimony Whereof, I hereunto set my hand and affix the seal of
said Appellate Court, at Ottawa, this 26th day of
March in the year of our Lord one thousand
nine hundred and thirty-four.

Justus L. Johnson
Clerk of the Appellate Court



41474

NATHAN GORDON,
(Plaintiff) Appellant,

v.

HENRY M. PETERS and EDWARD
GREGORY,
Defendants.

HENRY M. PETERS,
(Defendant) Appellee.

18 76
APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

313 I.A. 261

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

An action for damages for personal injuries sustained by plaintiff as a result of an accident which occurred on October 17, 1936, when Edward Gregory, defendant, driving an automobile owned by Henry M. Peters, defendant, crashed into a parked car, causing it to move forward so that it struck plaintiff and seriously injured him. The case was tried before the court and a jury. Two verdicts were returned by the jury, one finding defendant Gregory guilty and assessing plaintiff's damages in the sum of \$5,000, and another finding defendant Peters guilty and assessing plaintiff's damages in the sum of \$10,000. Judgments were entered on both verdicts. On plaintiff's motion the judgment against Gregory was vacated and the cause dismissed as to him. At the close of the evidence defendant Peters made a motion for a directed verdict, and ruling thereon was reserved by the court. After the entry of judgment against him Peters made a motion for judgment notwithstanding the verdict, and also made a motion for a new trial. Some time later the trial court entered a judgment vacating the judgment that had been entered against Peters, and entered judgment in favor of defendant Peters notwithstanding the verdict. Plaintiff appeals.

That plaintiff was in the exercise of due care and caution for his own safety at the time of the accident and that

41474

WATSON
(Plaintiff)

v.

HENRY
GLENN

HENRY
(Defendant)

MR. PRESIDENT OF THE COURT: This is a case of a writ of habeas corpus.

The record shows that the defendant was arrested on October 1, 1938, and held in custody until October 10, 1938, when he was released.

by plaintiff, who is a citizen of the State of California.

October 1, 1938, when he was arrested, and held in custody until October 10, 1938, when he was released.

and the record shows that the defendant was arrested on October 1, 1938, and held in custody until October 10, 1938, when he was released.

a period of ten days, and the record shows that the defendant was arrested on October 1, 1938, and held in custody until October 10, 1938, when he was released.

plaintiff and the defendant, and the record shows that the defendant was arrested on October 1, 1938, and held in custody until October 10, 1938, when he was released.

the court and the jury, and the record shows that the defendant was arrested on October 1, 1938, and held in custody until October 10, 1938, when he was released.

one of the reasons for the arrest, and the record shows that the defendant was arrested on October 1, 1938, and held in custody until October 10, 1938, when he was released.

damages in the sum of \$10,000, and the record shows that the defendant was arrested on October 1, 1938, and held in custody until October 10, 1938, when he was released.

Plaintiff seeks to recover damages in the sum of \$10,000, and the record shows that the defendant was arrested on October 1, 1938, and held in custody until October 10, 1938, when he was released.

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Plaintiff seeks to recover damages in the sum of \$10,000, and the record shows that the defendant was arrested on October 1, 1938, and held in custody until October 10, 1938, when he was released.

with appeal.

The court has considered the evidence and the law, and the record shows that the defendant was arrested on October 1, 1938, and held in custody until October 10, 1938, when he was released.

Plaintiff seeks to recover damages in the sum of \$10,000, and the record shows that the defendant was arrested on October 1, 1938, and held in custody until October 10, 1938, when he was released.

he was severely injured through the negligence of defendant Gregory is not disputed. It is agreed that the action of the trial court in entering judgment non obstante veredicto was based upon the theory that plaintiff's evidence proved that Gregory was an independent contractor and not a servant or agent of defendant Peters at the time of the accident. Plaintiff contends that he introduced evidence tending to prove that Gregory, in operating the automobile at the time of the accident, was acting as the agent or servant of Peters. Defendant contends that plaintiff introduced no evidence that tended to prove any relationship between Gregory and Peters "other than that of ~~principal and~~ an independent contractor," and that the trial court so held when he finally entered a judgment non obstante veredicto.

The rules that govern a trial court in passing upon a motion non obstante veredicto are well established. In Cooper v. Safeway Lines, Inc., 304 Ill. App. 302, 312, 313, we said: "The first question presented is whether the trial court erred in entering judgment in favor of defendants notwithstanding the verdicts of the jury in favor of plaintiffs. Rule 22 of the Supreme Court provides: 'The power of the Court to enter judgment notwithstanding the verdict may be exercised in all cases where, under the evidence in the case, it would have been the duty of the Court to direct a verdict without submitting the case to the jury.' A motion to direct a verdict for a defendant preserves for review only the question of law whether from the evidence in favor of plaintiff, standing alone and when considered to be true, together with the inferences which may legitimately be drawn therefrom, a jury might reasonably have found for plaintiff. (Thomason v. Chicago Motor Coach Co., 292 Ill. App. 104; Brophy v. Illinois Steel Co., 242 Ill. 55; City of Chicago v. Jarvis, 226 Ill. 614.) It is only where there is no evidence to sustain a plaintiff's

Others

[illegible]

claim that a judgment may be rendered notwithstanding the verdict. (McCarthy v. Morrison, 283 Ill. App. 129.)" In Thomason v. Chicago Motor Coach Co., supra, we said (p. 110): "A motion to instruct the jury to find for the defendant is in the nature of a demurrer to the evidence, and the rule is that the evidence so demurred to, in its aspect most favorable to the plaintiff, together with all reasonable inferences arising therefrom, must be taken most strongly in favor of the plaintiff. The evidence is not weighed, and all contradictory evidence or explanatory circumstances must be rejected. The question presented on such motion is whether there is any evidence fairly tending to prove the plaintiff's declaration. In reviewing the action of the court of which complaint is made we do not weigh the evidence, - we can look only at that which is favorable to appellant. Yess. v. Yess, 255 Ill. 414; McCune v. Reynolds, 288 id. 188; Lloyd v. Rush, 273 id. 489." (Hunter v. Troup, 315 Ill. 293, 296, 297.)' (Mahan v. Richardson, 284 Ill. App. 493, 495.)" In Walaite v. C. & N. Ry. Co., 376 Ill. 59, the Supreme court stated (pp. 61, 62): "On a motion for judgment notwithstanding the verdict, in the trial court, and on an appeal from a judgment of the trial court granting such motion, the question presented is whether there is any evidence, which, taken with its intendments most favorable to appellee, tends to prove the charge of the complaint. (Sycamore Preserve Works v. Chicago and Northwestern Railway Co., supra; Miles v. Long, 342 Ill. 589; Leighton & Howard Steel Co. v. Snell, 217 id. 152.) If there is in the record evidence, which, standing alone, tends to prove the material allegations of the complaint, a motion for judgment notwithstanding the verdict, should be denied, even though upon the entire record the evidence may preponderate against the plaintiff so that the verdict in his favor cannot stand when tested by a motion for a new trial. Libby, McNeill & Libby

v. Cook, 222 Ill. 206."

In passing upon plaintiff's contention that he introduced evidence tending to prove that Gregory, in operating the automobile at the time of the accident, was acting as the agent or servant of Peters, the following evidence must be considered:

On October 17, 1936, defendant Gregory was employed at the "Waggoner Greasing Palace," at 63d and Whipple streets, washing, greasing and simonizing cars. About 9 o'clock a. m., defendant Peters, in his car, stopped at the back door of the place to have his car washed, greased and simonized. Gregory testified that he had never met Peters before that day; that when Peters got out of his car he stated that he wanted the car "washed, greased and simonized;" that he asked how much it would cost, and Gregory answered, "five and one-half;" that Peters then brought the car behind the garage and asked Gregory if he would simonize the car any cheaper than \$5.50, to which Gregory answered that he would do it for three dollars; that Peters then said, "Will you go home with me," to which Gregory answered, "No, I can do it right back of the garage;" that Peters then said, "All right," and "he pulled his car right up in the vacant lot, right up in the alley right opposite the garage;" that Gregory then said, "I haven't enough to do the job with," to which Peters replied, "What are you lacking?" that Gregory answered, "I have to have some more wax, some rags and some cleaner;" that Peters said: "'You got any money?' and I said, 'No.' So he gave me a dollar;" that Gregory then said, "I got rags over at the house," and Peters said, "Here are the keys. You take the keys and the car and go on over and get the rags, the wax and the cleaner, but just be through with the car about two o'clock, because I will be back for it about two or two-thirty;" that as he walked away he said, "Be sure and be through with it." Gregory further testified that after he had

In passing upon the evidence in this case, the jury, in reaching the verdict, was not misled by the evidence, and the evidence is not such as to require a verdict of acquittal. On the contrary, the evidence is such as to require a verdict of guilty.

On October 12, 1936, at the "Haggar" Garage, in the city of New York, the defendant, Gregory, was arrested by the police. Gregory was arrested at the "Haggar" Garage, in the city of New York, on October 12, 1936. Gregory was arrested at the "Haggar" Garage, in the city of New York, on October 12, 1936. Gregory was arrested at the "Haggar" Garage, in the city of New York, on October 12, 1936.

Testimony was given by the defendant, Gregory, that he had never seen the car which was the subject of the indictment. Gregory testified that he had never seen the car which was the subject of the indictment. Gregory testified that he had never seen the car which was the subject of the indictment. Gregory testified that he had never seen the car which was the subject of the indictment.

"Will you go home with me," he said to Gregory. Gregory answered, "No, I can't do it right back of the garage." Gregory answered, "No, I can't do it right back of the garage." Gregory answered, "No, I can't do it right back of the garage." Gregory answered, "No, I can't do it right back of the garage."

some days and some nights," he said to Gregory. Gregory answered, "No, I can't do it right back of the garage." Gregory answered, "No, I can't do it right back of the garage." Gregory answered, "No, I can't do it right back of the garage." Gregory answered, "No, I can't do it right back of the garage."

one of the "Haggar" Garage, in the city of New York, on October 12, 1936. Gregory was arrested at the "Haggar" Garage, in the city of New York, on October 12, 1936. Gregory was arrested at the "Haggar" Garage, in the city of New York, on October 12, 1936.

worked on Peters' car for about an hour and a half he got in the car and drove to his home at 5541 LaFayette avenue to get the rags; that he got the rags there and then went to Pick's hardware store, at 55th and Michigan avenue, and bought two cans of simonizing material; that he was driving back to the garage to finish the work on the Peters car when the accident happened; that he used the car for the sole purpose of getting the rags and simonizing material that were to be used upon the Peters car. William Larson, the manager of the Waggoner Greasing Palace, testified that about 3 or 4 o'clock in the afternoon of October 17, 1936, he told Peters that his car had been in an accident, to which Peters answered "that he was sorry that he sent Gregory with his car to get the rags, the material, and the wax," and that "he was going down to the police station and bail Mr. Gregory out." Peters, testifying in his own behalf, stated that when he left Gregory he told him that he would be back in an hour and a half or two hours to see how he was getting along with the work. The following occurred in the cross-examination of Peters: "Q. Now, in the deposition at my office on January 19, 1939, let me ask you first, did you tell Gregory you would come back to see how he was coming with the job? A. I did, yes. Q. You told him that. Did you make this answer to this question: 'Q. When were you going to come back for your car?' 'A. I told him in about an hour and a half or two hours, that is what I told him. I wanted to show up there a little sooner, I wanted to see if he was working on the car.' The Witness: A. Yes."

The aforesaid evidence, with all of its reasonable inferences, shows that Peters hired Gregory to simonize the car; that he told Gregory that he must be sure and be through the work on the car about two o'clock; that Gregory told Peters that he had to have some more wax, some rags and some cleaner to complete the job and

that he had rags over at his home; that Peters asked Gregory if he had any money and Gregory said, "No," whereupon Peters gave Gregory a dollar, at the same time saying to Gregory, "Here are the keys. You take the keys and the car and go on over and get the rags, the wax and the cleaner, but just be through with the car about two o'clock, because I will be back for it about two or two-thirty;" that Peters handed the keys of the car to Gregory; that Gregory later got in the car and drove it to his home, where he got some rags, and then drove to the hardware store, where he purchased two cans of simonizing material, and then started back to the Waggoner Greasing Palace for the purpose of completing his work on the car, and that while he was on his way back to Waggoner's the accident occurred; that the only purpose for which he used the car was to obtain rags and simonizing material to be used on the Peters car.

It appears, therefore, that at the time of the accident Gregory was driving Peters' car, at the latter's direction, on an errand that Peters had directed Gregory to perform, the purposes of the errand being directly connected with the services that Peters had hired Gregory to perform upon the car; that Peters had Gregory use the car in order to hasten the completion of the work upon it so that Peters might be able to use the car about two or two-thirty o'clock p. m. Under such circumstances Gregory at the time of the accident was acting as the agent or servant of Peters. The trial court therefore erred in entering the judgment in favor of defendant Peters notwithstanding the verdict of the jury.

Defendant Peters contends that if we do not affirm the decision of the trial court then in our judgment order reversing and remanding the cause we should also pass upon defendant's motion for a new trial. Motions for new trials are addressed to the nisi prius court and in the absence of disposition of it by that court the Appellate court has no jurisdiction to pass upon such a

that he had made over at his house; that Gregory had
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or two-and-a-half; that Gregory handed the keys of the car to
Gregory; that Gregory had a key in the car and that it was his
home, where he got some keys, and then drove to the store
store, where he purchased two tons of aluminum, and
then started back to the garage. Gregory said for the purpose
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motion. (See Herb v. Pitcairn, 377 Ill. 405. See, also, Walaite v. C., R. I. & P. Ry. Co., supra.)

The judgment of the Superior court of Cook county is reversed and the cause is remanded with directions to the trial court to pass upon defendant Peters' motion for a new trial, and for further proceedings not inconsistent with this opinion.

JUDGMENT REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

Sullivan and Friend, JJ., concur.

41933

HERBERT H. NABERS,
Appellee,

v.

BERYL JACOBSON,
Appellant.

APPEAL FROM MUNICIPAL

COURT OF CHICAGO.

313 I.A. 261²

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a judgment order overruling his motion and petition to vacate a judgment entered against him on March 21, 1941, in the sum of \$932.74. Defendant asks that the judgment order denying his motion and petition be reversed and that the cause be remanded with directions to vacate the judgment entered against him on March 21, 1941.

Plaintiff sued to recover a balance, \$932.74, alleged to be due him from defendant on account of the sale by plaintiff to defendant of 365 shares of common capital stock of Tyson Beverages, Ltd. at five dollars per share. Plaintiff claimed that the balance was due him after he had given defendant credit for \$593.50, which amount was due defendant as a bonus from said company upon said stock and which was paid to plaintiff to apply on the unpaid balance, and also, after plaintiff had given defendant credit for \$350, the amount for which the stock sold at public auction. Defendant, as his sole defense, alleged that the sale of the stock was made in violation of the Illinois Securities Law; that the shares of stock were securities in Class "C" or "D" within the meaning of the said law; that said shares of stock were never qualified for sale as required by the said law; that the sale by plaintiff to defendant was made in violation of the said law and was therefore void; and that defendant, as purchaser of the stock, has elected and elects to declare the sale by plaintiff to defendant null and void. Defendant filed a

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HERBERT J. ...

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BENNY J. ...

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counterclaim for \$593.50 in which he alleges that the shares of stock were securities in Class "C" or Class "D" within the meaning of the Illinois Securities Law; that the shares were never qualified for sale as required by the said law, and that the sale thereof by plaintiff to defendant was made in violation of the said law and was therefore void; that defendant paid to plaintiff \$593.50 on account of the purchase price of the stock. Plaintiff in his answer to defendant's statement of defense and in his answer to the counterclaim denied that the sale was made in violation of the Illinois Securities Law, and that the transaction was void. The judgment order entered March 21, 1941, reads as follows:

"Now comes the plaintiff in this cause, the defendant being absent and not represented, and thereupon this cause comes on in regular course for trial, before the Court, without a jury, and the Court having heard the evidence and the arguments of counsel and being fully advised in the premises enters the following finding, to-wit:- 'The Court Finds the Issues Against the Defendant, Beryl Jacobson, and Assesses the Plaintiff's Damages at the Sum of Nine Hundred Thirty-two and 74/100 Dollars.' This cause coming on for further proceedings herein, it is considered by the court that the plaintiff have judgment on the finding herein and that the plaintiff have and recover of and from the defendant, Beryl Jacobson, the damages of the plaintiff amounting to the sum of Nine Hundred Thirty-Two and 74/100 Dollars in form as aforesaid assessed, together with the costs by the plaintiff herein expended and that execution issue therefor. And it is further ordered by the Court that the Counter-Claim herein be and the same is hereby dismissed."

It appears that the judgment was entered upon the preliminary call of the trial call; that defendant's attorney reached

complaints for \$50,000.00 and the fact that the
of stock were recorded in the "Book of Shares" and the
meaning of the Illinois Constitution; that the
never be liable for a fine or imprisonment, and that
the sale thereof by plaintiff to defendant was a violation
of the said law and was therefore void; that the sale of
plaintiff \$50,000.00 on account of the payment of the stock
Plaintiff in his answer to defendant's statement of claim
in his answer to the complaint and that the same was
in violation of the Illinois Constitution; that the same
action was void. The judgment of the court is affirmed, and the
as follows:

"Now comes the plaintiff in his claim, and the
being absent and not represented, in the court of law, and
on in regular course for trial, before the court, and
and the court is finding that the defendant is in violation of
counsel and being advised in his answer to the complaint
ing finding, to-wit: The court finds that the defendant
Defendant, Jerry Gibson, has caused the Illinois Constitution
at the sum of Nine hundred and fifty thousand (\$950,000.00) and
causes coming on for further proceedings herein, and is ordered
by the court that the plaintiff's judgment on the finding
in and that the plaintiff may have recovery of the sum of
ant, Jerry Gibson, the sum of Nine hundred and fifty thousand
sum of Nine hundred and fifty thousand (\$950,000.00) and
said assessed, together with the costs of the suit, and the
expended and that the action is in violation of the Illinois
ordered by the court that the defendant pay to the plaintiff
same is hereby affirmed."

It is ordered that the defendant pay to the plaintiff
the sum of Nine hundred and fifty thousand (\$950,000.00) and
the costs of the suit, and the action is in violation of the
Illinois Constitution.

the court room before the second call of the cases, and that upon the second call the trial court informed defendant's counsel that judgment had been entered on the preliminary call; that the trial court informed counsel that he could not disturb the judgment in the absence of plaintiff's counsel and that defendant's counsel should serve notice on opposing counsel. On March 24, 1941, after notice to plaintiff's counsel, a verified petition to vacate the judgment was filed. The petitioner, Ward C. Swalwell, attorney for defendant, alleged that the cause came on for hearing on March 7, 1941, and was continued to April 14, 1941; that "since said date he has been confined to his home because of illness; that an associate attorney of your petitioner had been handling the above matter during the illness of your petitioner and that said attorney called your petitioner on the phone on the evening of March 20th, notifying him that the cause was to be heard on the morning of March 21 in Room 1105 City Hall; * * * that on his way to court on the morning of March 21st, 1941 he was unavoidably detained because of trouble with his car; that he arrived in said Court Room about fifteen minutes late at which time he learned that a judgment in the amount of \$932.74 and costs had been entered against the defendant; * * * that he has a good and meritorious defense in this cause which is as follows: That the defendant rescinded the contract on the grounds that said stock was never qualified under the Illinois Security Law, Section 4 and that said shares of stock were not sold by the plaintiff to this defendant in an exempt transaction within the meaning of Section 5 of the Illinois Security Law; that said shares of stock are securities in Class C or D within the meaning of the said Illinois Security Law and that said sale was made in violation of the Illinois Security Law and therefore void. * * * Wherefore your petitioner prays that he may

be given an opportunity to present his defense in this matter and that the judgment entered against the defendant on March 21, 1941, be vacated, set aside and held for naught, and that the cause be set for an early hearing to be set by this Court." Plaintiff made no motion to strike the petition. When it came on for hearing on March 24, the trial court, upon his own motion, continued the hearing until April 18, 1941, at the same time stating: "At that time I will require the defendant to show that he has a good defense to this action and unless he does so, I will not vacate the judgment." After several further continuances the matter came on for hearing on April 28, 1941, at which time the following occurred:

"Mr. Gladstone [attorney for defendant]: This matter is before your Honor on a Petition to vacate a default judgment. On the day the Petition was filed, your Honor told my associate, Mr. Swallow, that you would vacate the judgment if he showed you that the Defendant had a good defense to Plaintiff's claim. The Defendant claims that the securities alleged to have been sold to him, were not qualified for sale in the State of Illinois under the Illinois Securities Law and that the Defendant elected to declare the said sale void. We now offer a Certificate of Non-Compliance issued by the Secretary of the State of Illinois, under the seal of the State of Illinois, certifying that no statement of Tyson Beverages, Ltd. was filed by the Secretary of State of the State of Illinois, under the Illinois Securities Law.

"The Court: It may be received, let me see it (reading). The said Certificate of Non-Compliance is in words and figures as follows:

"IN THE OFFICE
OF THE
SECRETARY OF STATE
OF THE

time the following occurred:

[illegible]

1201107

SECURITIES DEPARTMENT

"I, Edward J. Hughes, Secretary of State of the State of Illinois, pursuant to the provisions of Section 37 of the Illinois Securities Law, do hereby certify that no statement of Tyson Beverages, Ltd. under the Illinois Securities Law has been filed by the Secretary of State of the State of Illinois, as therein provided, to qualify for sale in Illinois any securities of said Tyson Beverages, Ltd., and that no securities of Tyson Beverages, Ltd. have been otherwise registered by said Secretary of State under the Illinois Securities Law for sale in this State, as therein provided.

"In Witness Whereof, I have hereunto set my hand and affixed the Great Seal of the State of Illinois, this 17th day of April, 1941.

"(Signed) Edward J. Hughes,
"Secretary of State.

"The Court: I do not think this constitutes a sufficient defense.

"Mr. Gladstone: The Illinois Securities Law provides that the Certificate of Compliance or Non-Compliance of the Secretary of State is prima facie evidence of the facts stated therein. This Certificate of Non-Compliance is prima facie evidence of the allegations in our Statement of Defense and Counter-Claim. Under the law, the burden now shifts to the Plaintiff to prove that the sale was made in conformance with the Illinois Securities Law, or that it came within one of the exceptions. That is, that the securities sold were Class A, exempt securities, or that the transaction was in Class B, and hence, also exempt. The recent case of People v. Wilson is the last authority on the point.

"Mr. Woodward [attorney for plaintiff]: This proceeding is just being used for delay. Mr. Gladstone is the fourth lawyer

in the case. Chapman & Cutler, who were the lawyers for the Defendant before Mr. Swalwell or Mr. Gladstone came into the case, told me that they did not think that the Defendant had a good case and wrote me a letter consenting to a judgment. This firm is considered the best lawyers on Blue Sky Laws in the City.

"The Court: I do not see how I can disturb a consent judgment. A consent judgment is one of the most sacred things in the law, and besides, you have one of the best firms in Chicago who state that the Defendant hasn't a good defense and consents to a judgment."

"Mr. Gladstone: Maybe that was the reason why the Defendant changed lawyers. We are not concerned, however, with that judgment, because the Plaintiff's attorneys stipulated to set that judgment aside and the Statements of Chapman & Cutler are not admissible in this case. We are only concerned with the last default judgment. On the day it was entered, Mr. Swalwell's automobile broke down on the Outer Drive. He got into Court before the second call and when the cases were called a second time, he stepped up to the Court and was informed that a judgment had been entered on the first call. You remember that you told him that you could not disturb the judgment that was entered without notifying the other side and you suggested to him that he serve notice on opposing counsel, which he did immediately.

"The Court: No, I won't disturb the judgment. Motion and Petition to set aside and vacate the default order and judgment is denied."

Thereupon the court entered a judgment order, dated April 28, 1941, overruling defendant's motion "to vacate Ex Parte finding, judgment and dismissal of counter-claim."

It is clear that the trial court, in passing upon the petition, was confused by the statement made by plaintiff's

in the case, Defendant's position, no. 1, is that the
Defendant's position is, in fact, no. 1, is that the
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"The Court: I am not going to say that it is not a case, and the fact that it is not a case."

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"The Court: I am not going to say that it is not a case, and the fact that it is not a case,
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counsel. The record shows that the judgment was not a consent judgment. Plaintiff, in his brief, states that it was entered because defendant was not represented by counsel when the case was called for trial. The trial court, in ruling upon the petition, seems to have been governed by the statement of plaintiff's counsel that certain lawyers who formerly represented defendant / told him that "they did not think that the defendant had a good case and wrote me a letter consenting to a judgment. This firm is considered the best lawyers on Blue Sky Laws in the City." The record shows that the firm in question withdrew as counsel for defendant on March 7, 1941. It is, of course, impossible to approve the reasons given by the trial court in denying the petition. The issue before the trial court was a simple one: whether the sale was made in violation of the Illinois Securities Law. Defendant alleged that it was in violation of that law. Plaintiff, in his statement of claim and in his answer to the counterclaim, denied that the sale was made in violation of that law. He did not reply or defend on the ground that the sale was a Class "A" security or that it was an exempt Class "B" transaction. He did not deny defendant's allegations that the securities were Class "C" or Class "D" securities, and these allegations were therefore admitted. Under the state of the pleadings plaintiff's defense that the sale was not made in violation of the Illinois Securities Law amounted to a claim that he had complied with the provision of the Act requiring securities of either Class "C" or Class "D" to be registered with the Secretary of State before being offered for sale. Upon the instant hearing before the trial court defendant introduced a certificate of the Secretary of State which showed "that no statement of Tyson Beverages, Ltd. under the Illinois Securities Law has been filed by the Secretary of State of the State of Illinois, as therein

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provided, to qualify for sale in Illinois any securities of said Tyson Beverages, Ltd., and that no securities of Tyson Beverages, Ltd. have been otherwise registered by said Secretary of State under the Illinois Securities Law for sale in this State, as therein provided." When defendant introduced the certificate he made out a prima facie defense to plaintiff's statement of claim and also a prima facie case as to his counterclaim (See Taft v. Otte & Co., 274 Ill. App. 280; People v. Wilson, 375 Ill. 506, affirming 306 Ill. App. 216), and the trial court erred in denying defendant's petition to set aside the judgment order of March 21, 1941. Had the trial court set aside the judgment he might, in a few minutes, have determined the cause upon the merits.

Plaintiff contends that the judgment may be sustained upon the ground that defendant's counsel was negligent, and calls attention to the fact that the cause was reached for trial on September 13, 1940, and that judgment was entered in favor of plaintiff and against defendant at that time, and that the judgment order shows that it was entered because defendant was not represented by counsel when the case was called for trial. For aught that appears in this record the first judgment may have been inadvertently entered, because plaintiff stipulated that it should be set aside. As to the instant judgment, the trial court apparently realized that it could not be sustained upon the ground that defendant's counsel was negligent, and his denial of the petition to vacate was not based upon that ground. Indeed, the second judgment was entered upon the preliminary call, and we take judicial notice of the fact that it is not the practice in the Municipal court of Chicago or in any of our local courts to enter judgment upon the preliminary call. In Hogan v. Ermovick, 335 Ill. 181, 183, the court states: "While it is highly commend-

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able to dispose of causes with celerity and dispatch it is more important that justice be done, and where for any good reason a defendant has been unable to present his defense, a court of law will set aside a judgment obtained ex parte and order a new trial. McMurray v. Peabody Coal Co., 281 Ill. 218; City of Moline v. Chicago, Burlington and Quincy Railroad Co., 262 id. 52; Mason v. McNamara, 57 id. 274."

The judgment order of the Municipal court of Chicago, dated April 28, 1941, is reversed, and the cause is remanded with directions to the trial court to vacate the judgment order of the Municipal court of Chicago dated March 21, 1941, and for further proceedings not inconsistent with this opinion.

JUDGMENT ORDER DATED APRIL 28, 1941,
REVERSED, AND CAUSE REMANDED WITH
DIRECTIONS TO VACATE JUDGMENT ORDER
DATED MARCH 21, 1941, ETC.

Sullivan and Friend, JJ., concur.

able to discuss the case of Johnson v. Johnson, 1941, 1942, 1943, 1944, 1945, 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025.

The Johnson v. Johnson case, 1941, 1942, 1943, 1944, 1945, 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025.

1941, 1942, 1943, 1944, 1945, 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025.

Sullivan and Sullivan, 1941, 1942, 1943, 1944, 1945, 1946, 1947, 1948, 1949, 1950, 1951, 1952, 1953, 1954, 1955, 1956, 1957, 1958, 1959, 1960, 1961, 1962, 1963, 1964, 1965, 1966, 1967, 1968, 1969, 1970, 1971, 1972, 1973, 1974, 1975, 1976, 1977, 1978, 1979, 1980, 1981, 1982, 1983, 1984, 1985, 1986, 1987, 1988, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1996, 1997, 1998, 1999, 2000, 2001, 2002, 2003, 2004, 2005, 2006, 2007, 2008, 2009, 2010, 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2022, 2023, 2024, 2025.

41546

WIMP PACKING COMPANY, an Illinois Corporation, ROY WIMP, LeROY WIMP and NETTIE WIMP,

Appellees,

v.

ELGY WIMP,

Appellant.

APPEAL FROM CIRCUIT COURT,
COOK COUNTY.

313 I.A. 262

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Wimp Packing Company, an Illinois corporation, whose stock was held principally by Roy Wimp and Elgy Wimp, his brother, brought suit in debt against Elgy Wimp, predicated on an account stated and an open account. Defendant denied the debt and filed a counterclaim for an accounting and liquidation of the corporation, joining the president and other stockholders as counter-defendants. The cause was referred generally to a master, who found the issues in favor of defendant and recommended the entry of a decree in accordance with his findings, including the appointment of a liquidating receiver and the dissolution of the corporation. Pursuant to hearing of exceptions to the master's report, the chancellor, after studying the report for several days, disapproved of the master's findings and conclusions, dismissed defendant's counterclaim, found the issues for plaintiff, and entered judgment in favor of plaintiff and against defendant for \$45,595.07, together with interest thereon from July 13, 1937, to April 23, 1940, amounting to \$6,446.23. Defendant seeks reversal of the decree entered.

The complaint filed July 13, 1937, alleged that defendant Elgy Wimp was connected with the corporation from January 29, 1918, to December 31, 1936, in the capacity of stockholder, officer and director; that during that period, and without authority from plaintiff, willfully, maliciously and with intent to defraud the corporation he took for himself on credit a large

41546

WIMP PACKING COMPANY, an Illinois
Corporation, ROY WIMP,
and BETTIE WIMP,

Plaintiffs,

v.

ELGY WIMP,
Defendant.

MR. JUSTICE FRANK DELANEY, CHIEF JUSTICE OF THE COURT.

Wimp Packing Company, an Illinois corporation, whose stock

was held principally by ROY WIMP and BETTIE WIMP, his wife,

brought suit in debt against ELGY WIMP, produced on an account

stated and an open account. Defendant claimed that he had filed

a counterclaim for an accounting and liquidation of the corpor-

ation, joining the president and other stockholders as counter-

defendants. The cause was referred generally to a master, who

found the issues in favor of defendant and recommended the entry

of a decree in accordance with his findings, including the liqui-

dation of a liquidating trust and the liquidation of the corpor-

ation. Pursuant to hearing in support of the defendant's motion,

the chancellor, after studying the record, for any reason, did

approve of the master's findings and conclusions, and entered

defendant's counterclaim, found in favor of plaintiff, and

entered judgment in favor of plaintiff and against defendant for

\$45,992.00, together with interest thereon from July 15, 1938, to

April 15, 1944, amounting to \$6,446.25, returning costs reversed

of the decree entered.

The complaint filed July 13, 1937, in the Circuit Court of

Elgy Wimp was connected with the corporation from 1918 to 1937,

1918, to December 31, 1936, in the capacity of stockholder,

officer and director; that on July 13, 1937, and at other

authority from plaintiff, in 1937, defendant is and has been

to deprive the corporation of its assets, on credit of Elgy

amount of goods from the corporation, for which he has not paid, and received large sums of money which he has not refunded. The complaint sets forth a list of more than 200 items, aggregating total debits of \$73,029.07, during the period in which he was connected with the corporation, and total credits of \$27,434, indicating a balance due the corporation of \$45,595.07.

It is further alleged that December 31, 1936, at the company's office in Chicago, plaintiff and defendant accounted together concerning the sums of money before that time owing from defendant to plaintiff, and upon such account it was found defendant was indebted to plaintiff in the sum of \$45,595.07, with interest thereon at 6 per cent per annum, which defendant promised to pay when requested; that payment thereof was demanded of defendant by plaintiff on the aforementioned date, and every month previous to the commencement of the enumerated statement of account, but defendant refused and still refuses to pay the same.

Defendant's answer admits his connection with the corporation during the period alleged as stockholder, officer and director, but categorically denies substantially all the other material allegations of the complaint; and as a further defense he avers that as to the \$72,171.29, part of the cause of action, the same did not accrue to plaintiff at any time within five years next before the commencement of the action, and that the suit is therefore barred by the Statute of Limitations.

By way of amended counterclaim defendant alleged that he and his brother Roy are and have been since 1918 the sole and only stockholders of the corporation, with the exception of a qualifying share issued to LeRoy Wimp, a son of Roy Wimp, and that said stockholdings are as follows: Roy Wimp, 1318

shares; Elgy Wimp, 681 shares; LeRoy Wimp, 1 share, or an aggregate of 2,000 shares, which constitute all the issued and outstanding stock of the corporation; that defendant and his brother Roy, at the time of their subscriptions to the capital stock of the company, gave in partial payment thereof their respective notes secured by capital stock as collateral; that defendant, from the date of the organization of the company, has been its vice president and treasurer and a member of the board of directors; that Roy Wimp has been president and director, and his son LeRoy, secretary and a director; that from time to time defendant made meat purchases from the corporation which were charged to his open account, similar purchases also being made by Roy and LeRoy, which were charged to their respective accounts; that all these purchases were the result of a mutual custom and understanding, "and it was never intended that any interest charges were to be made by the corporation upon said open accounts;" that certain insurance policies were taken out on the lives of defendant and Roy for the benefit of the corporation some time after its organization; that the policy on the life of defendant (Equitable Life Assurance Society policy No. 3960337) was payable to his estate as beneficiary, but was pledged as collateral to a loan of the corporation with the Depositors State Bank, and it was always intended that the corporation was to be the beneficiary of this policy; that the Depositors State Bank passed into receivership and for convenience no change was made in the beneficiary until about October, 1936, when the corporation paid off its loan to the bank and the policy was released, and thereupon the corporation was promptly made the beneficiary thereunder.

It is further alleged that in September, 1926, Roy willfully and maliciously entered upon a course of conduct designed

to unlawfully and wrongfully deprive defendant of his stock in the corporation and to unlawfully exploit it and convert its funds and assets for his own benefit; and in pursuance of the plan and scheme Roy has since that time continuously, arbitrarily and unlawfully manipulated the affairs, moneys and properties of the corporation for his own use and benefit, to the injury of defendant and to the end that defendant might be deceived as to the actual condition of the business and his rights to stock in the corporation; that Roy has maliciously caused certain unlawful and wrongful interest charges to be placed against defendant's open account over a number of years and without his knowledge; to this allegation there is appended a list of 13 items, beginning with September 30, 1926, to December 31, 1936, aggregating \$17,532.47, which are alleged to be charges made contrary to the custom and understanding between the parties and never provided for at any valid meeting of the stockholders or directors.

It is further alleged that Roy maliciously caused certain unlawful and wrongful charges to be placed against defendant's open account, without his knowledge, for life insurance premiums paid over a number of years in the sum of \$12,043.62 on the aforesaid insurance policy, which were properly chargeable to the corporation; that he likewise maliciously caused certain unlawful and wrongful charges to be placed against defendant's open account over a number of years, without defendant's knowledge, consisting of many miscellaneous items, and in particular one item dated April 2, 1919, in the amount of \$10,000, which were erroneous and have no basis in fact; that Roy maliciously caused certain unlawful and wrongful credits to be placed upon Roy's open account over a number of years, without defendant's knowledge, covering, among other things, interest credits on a loan from Roy to the corporation, aggregating \$7,195.09, which was never authorized at any valid meeting of the stockholders or directors;

[illegible]

that Roy maliciously caused certain unlawful and wrongful credits to be placed upon Roy's notes receivable account, thereby reducing his indebtedness to the corporation on three items, respectively, of \$30,307.89, \$23,728.06 and \$6,579.83; that the entry of these items was unlawful, wrongful and erroneous in that the total debit to common stock unissued should have been prorated between Roy and Elgy in proportion to their stockholdings, and on that basis the notes receivable account of Roy should have been \$19,972.90 and the credit to the notes receivable account of Elgy should have been \$10,319.84; and it is alleged that thereby the notes receivable account of Roy was overcredited in the sum of \$3,755.16, and the notes receivable account of Elgy was undercredited in the sum of \$3,740.01.

The amended counterclaim contained various other allegations of a similar nature, alleging wrongful acts on the part of Roy to the prejudice of defendant's rights and interests in the corporation; and he therefore asked for an accounting, judgment, the appointment of a receiver and the dissolution of the corporation. The answer to the counterclaim, in the main, categorically denied the numerous allegations of the counterclaim and asked the dismissal thereof.

The hearings before the master to whom the cause had been referred continued for approximately four months, and when he filed his report, counsel for the respective parties were evidently of opinion that the master had misconceived the issues and asked him to file another report, which is substantially the same as the first. To this report plaintiff and counterdefendant filed objections and exceptions charging that the findings of the master in both reports were in direct conflict with the evidence and erroneous as to the legal conclusions drawn from the evidence; that the master had failed to comprehend the points in issue; that he was absent from several of the hear-

that Roy maliciously caused a certain number of and wrongful
credits to be placed upon Roy's notes receivable account,
thereby reducing his indebtedness to the extent of the same
items, respectively, of \$30,000.00, \$25,000.00, \$10,000.00,
that the entry of these items was wrongful, wrongful and
erroneous in that the total debit to each of such misstatements
should have been protested between Roy and Lily in connection
to their stockholdings, and on that basis the notes receivable
account of Roy should have been \$15,000.00 and the credit to
the notes receivable account of Lily should have been \$10,000.00;
and it is alleged that thereby the notes receivable account of
Roy was overvalued in the sum of \$1,000.00, and the notes re-
ceivable account of Lily was undervalued in the sum of \$2,000.00.
The amended counterclaim contained various other allegations
of a similar nature, alleging wrongful acts on the part of Roy as
the prejudice of defendant's rights and interests in the corpo-
ration; and he therefore asked for an accounting, judgment, the
appointment of a receiver and the dissolution of the corporation.
The answer to the counterclaim, in the main, categorically denied
the numerous allegations of the counterclaim and asked the dis-
missal thereof.
The hearings before the master to whom the cause had been
referred continued for approximately four months, and when he
filed his report, counsel for the respective parties had exten-
sively of opinion that the case was not worth litigating further
and asked him to file another report, which he submitted. Lily
the same as the first, to this report plaintiff and defendant
defendant filed objections and motions claiming that the
findings of the master in both reports were in violation of the
with the evidence and arguments as to the legal conclusions
drawn from the evidence; that the master had failed to comply with
the points in issue; that he was deprived from counsel of the right

ings, late at others, and inattentive; and "that because of the similarity of the legal verbiage of the counterclaim and the Master's second report, it is a difficult task to convince the ordinary mind that the Master arrived at his conclusions from his own impartial investigations of the evidence and the law;" that it was necessary and hearings were had without the master being present; and that the entire second report was inconsistent with the evidence. Defendant and counterclaimant Elgy Wimp likewise filed objections to the report, in which he charged that it was incomplete and defective in its entirety; that all the findings of the master were imperfect, restricted and not sufficiently comprehensive to properly inform the court on the matters of fact and law involved therein, and that the report ought to be varied, altered and completely revised. These objections and exceptions were called to the attention of the chancellor and were later brought to our attention on oral argument. By reason of the objections and exceptions, the chancellor was evidently prompted to make an independent study of the entire record, and after considering the pleadings and evidence, totally disapproved of the master's conclusions and entered the decree from which this appeal is prosecuted.

With respect to the account stated, the master found from the evidence submitted that plaintiff had failed to prove an account stated against Elgy Wimp in any sum whatsoever, and that no such account exists. He concluded that the evidence disclosed a credit balance on the notes receivable account of Elgy Wimp amounting to \$3,923.82 which is properly applicable against the debit balance of \$3,882.58 on his open account, leaving a net credit of \$41.24 in favor of defendant, and recommended "that a permanent and liquidating receiver be appointed *** for the plaintiff corporation, *** with full power to liquidate the assets and business of said plaintiff

ings, fact of obduracy, and inconstancy; and the master's
sincerity of his feelings towards the slave, and the
master's second report, in which he stated that the slave
ordinarily and not on 17th April arrived at the station from
his own independent investigations of the facts of the case;
that it was necessary to bring the matter before the court
being present; and that the master's second report was inconsistent
with the evidence. The court then considered the evidence
with the view of objections to the report, in which it was
was incomplete and defective in the evidence; that the findings
of the master were incorrect, notwithstanding the fact that the
comprehensive to prepare the report on the facts of the case
and law involved therein, and that the report ought to be
altered and completely revised. These objections were
were raised to the attention of the master and the court
brought to the attention of the court. The court then
objections and exceptions, the court then considered the
to make an independent study of the evidence, and with con-
sidering the findings and evidence, and the court then
master's conclusions in the case, and the court then
is presented.

With respect to the second report, the court then
the evidence submitted to the court, and the court then
account stated against the fact that the master's
that no such account exists. The court then considered
disclosed, and the court then considered the evidence
five hundred pounds, and the court then considered the
against the balance of 25,000, and the court then
leaving a net profit of 25,000. The court then
recommended a dividend of 25,000, and the court then
appointed the dividend, and the court then
power to divide the net profit of 25,000.

corporation, and that upon the completion of said liquidation, that said plaintiff corporation be dissolved by order of this Court."

Several years before the complaint was filed, Elgy Wimp had voluntarily severed his connection with all activities of the plaintiff corporation and had organized and started an independent packing business of his own in Streator, Illinois. During all this time plaintiff was and is still a going concern and there was no justification whatever, in law or in fact, for recommending a liquidating receiver and dissolving the company, by reason of the controversy which arose between two of its stockholders as to their respective accounts. The statute makes no provision for such drastic action and the master cites no authority for his recommendation. Therefore, the court properly rejected this recommendation of the master.

The pleadings and evidence with respect to the account stated may be briefly summarized as follows: October 18, 1938, plaintiff filed an amendment to its complaint, alleging that on June 7, 1937, it accounted together with defendant as to money before that time owing from defendant to plaintiff, and that it was then found that defendant was indebted to plaintiff in the sum of \$33,551.45, and for the further sum of \$12,043.62 for moneys advanced for defendant on his insurance premiums and interest. The evidence discloses that June 7, 1937, plaintiff mailed to defendant at Streator, Illinois, where he was then engaged in the packing business a letter with enclosure of plaintiff's exhibit 2 of May 4, 1938, showing a complete statement of Elgy Wimp's account. This letter and account were mailed in an envelope containing thereon the name and address of plaintiff's attorney for return; and it was shown that the letter so mailed was not returned undelivered by the post office department. In

George, who was the only one of the family to be
born in the United States, was born in the
Court.

Several years before the death of George, the
had voluntarily severed his connection with the
the plaintiff's business and had been in the
independently seeking business of his own in the
During all this time, the plaintiff's business
and there was no battle between them, in fact, the
recommencing a living thing, and the plaintiff's
by reason of the plaintiff's business, the
stockholders as to their respective shares, the
no provision for such a situation, and the
authority for his own and those of his family, the
rejected this proposition as to the plaintiff's

The plaintiff and the defendant, who were
stated by the plaintiff's counsel, that the
plaintiff's claim against the defendant, dated
June 7, 1907, it occurred to the plaintiff, that
before that time, the plaintiff's claim against
was the plaintiff's claim against the defendant,
sum of \$10,000, and the plaintiff's claim against
months, and the plaintiff's claim against the
interest, the plaintiff's claim against the
method of the plaintiff's claim against the
engaged in the plaintiff's business, and the
title of the plaintiff's claim against the
the plaintiff's claim against the defendant,
involved, and the plaintiff's claim against the
authority for the plaintiff's claim against the
the plaintiff's claim against the defendant, in

Dick v. Zimmerman, 207 Ill. 636, the court, under similar circumstances, held that such a letter, properly addressed and mailed, raises the presumption that it reached the addressee. The statement enclosed in the letter contained an itemized list of the yearly totals of debits and credits in the account of Elgy Wimp for the years 1917 to 1936, both inclusive, and represented the yearly totals for those years of all the items in plaintiff's complaint, except the insurance premiums for the years 1926 to 1937, both inclusive. Defendant denied having received or seen this exhibit. Steve Tandaric, plaintiff's bookkeeper, testified that between June 15 and 19, 1936, he made up a statement of defendant's account and showed it to him in plaintiff's office. Another witness, Fred DeJaeger, testified that he was employed by the corporation from July, 1934, to April, 1935, as bookkeeper; that he drew off monthly or annual statements and showed them to defendant; that he explained accounts payable of defendant, especially on account of the interest computed every year. Roy Wimp, president of the corporation, testified that after Elgy had begun to run behind in his account, he "would show him a statement and demand what was on the statement at that time," and it was his recollection that the last time he showed Elgy such a statement was August 1, 1936. He then asked him to pay it, and Elgy promised to do so as soon as he could.

Defendant denied generally that an account stated had been had with plaintiff. He denied receiving the latter of June 7, 1937, with an itemized account enclosed, mailed to him at Streator, Illinois. When a statement showing his account was exhibited at the hearing, he denied having ever seen it.

He admitted knowing DeJaeger, formerly bookkeeper of plaintiff corporation, but denied that he had ever received from him any statement of the condition of the company or any account, or that Jaeger had ever spoken to him about the mounting interest

charges. Defendant likewise denied the testimony of other witnesses offered on behalf of plaintiff with reference to the account stated, and took the position that no accounts had ever been rendered to him.

The evidence shows that plaintiff had paid an aggregate of \$12,043.62 as insurance premiums on a policy issued to defendant during the years in question. The Equitable Life Assurance Society of the United States had issued a policy No. 3960337 in the amount of \$15,000 on the life of Elgy Wimp, payable to his executors, administrators or assigns. The premiums were undoubtedly advanced by plaintiff, and plaintiff was entitled to be reimbursed therefor. As against the documentary evidence and the testimony of at least two witnesses other than Roy Wimp, president of the corporation, all indicating that Elgy Wimp's account had been the subject matter of discussion over a period of years, that a statement of his account was presented to him on various occasions and finally mailed to him at Streator, we have the denial by Elgy that an account was ever presented to him or that he received the letter containing an itemized statement of the account at Streator. Plaintiff's witnesses testified that Elgy Wimp had promised to pay the amount which he allegedly owed as soon as he was able to do so. This testimony he also denied. It is difficult to reconcile Elgy's testimony with the evidence adduced by plaintiff. Under ordinary circumstances a master's findings, although not conclusive, are entitled to due weight in consequence of the opportunities afforded him for determining the credibility of witnesses, but in this case both counsel complained of the absence and inattention of the master at hearings, of the inconsistency between the evidence and his findings, which Elgy Wimp in his objections characterized as "imperfect, restricted, and not sufficiently comprehensive to properly inform the court on the matters

charges. It is not clear from the evidence whether the charges were made in person or by letter. The charges were made in person, and the charges were made in person.

The witness states that the charges were made in person.

of \$12,000.00 as a loan, and the charges were made in person.

lending money. The charges were made in person.

Assurance, and the charges were made in person.

No. 190333 in the amount of \$12,000.00 as a loan, and the charges were made in person.

payable to his executor, and the charges were made in person.

minors were undoubtedly advised by their parents, and the charges were made in person.

entitled to be reimbursed therefor, and the charges were made in person.

evidence and the testimony of the witness, and the charges were made in person.

Roy King, president of the board of directors, and the charges were made in person.

Elly King's account had been paid, and the charges were made in person.

over a period of years, and the charges were made in person.

presented to the board of directors, and the charges were made in person.

at that time, and the charges were made in person.

presented to the board of directors, and the charges were made in person.

intended to be paid to the board of directors, and the charges were made in person.

nesses, and the charges were made in person.

which he subsequently paid, and the charges were made in person.

testimony of the witness, and the charges were made in person.

testimony of the witness, and the charges were made in person.

ordinary circumstances, and the charges were made in person.

relative, and the charges were made in person.

trusts, and the charges were made in person.

nesses, and the charges were made in person.

and the charges were made in person.

between the witness and the board of directors, and the charges were made in person.

outstanding, and the charges were made in person.

standing, and the charges were made in person.

of fact and law involved therein," and which are also severely criticised by plaintiff. Because of these circumstances, the chancellor was obliged to examine the record independently and we have deemed it necessary to do likewise. From such examination we think the chancellor properly disapproved of the master's findings and found in favor of plaintiff on the account stated.

It is, of course, a fundamental rule that Elgy Wimp had the burden of establishing his counterclaim by a preponderance of the evidence. A considerable portion of his testimony as to notice and knowledge of the plaintiff's books and account was contradicted by several witnesses. The record does not sustain his contentions as to the counterclaim. Certainly there was no ground for the recommendation that a liquidating receiver be appointed and the corporation dissolved, since it was a going concern, and there was no justification from the evidence in finding that its assets should be taken from the control of its officers who had managed the business for many years, notwithstanding the controversy between two of the stockholders as to their individual accounts.

Defendant's counsel advances various legal propositions with respect to the account stated. It is urged that, in order to constitute an account stated, there must be, in every case, proof in some form of assent to the account, and an acknowledgment of the indebtedness of a certain sum. We think plaintiff made a satisfactory showing in this respect. If the testimony of plaintiff's witnesses is to be believed, Elgy Wimp received statements of his account from time to time, showing the items which he now disputes. There is evidence that he promised to pay the account. He now takes the position that he never received these statements, but if the conclusion is justified that statements were presented to him periodically and ultimately mailed to him at

Streator, without any dissent on his part, assent would be implied. It is also urged that an account stated is only prima facie evidence of its correctness, and may be impeached for fraud, mistake, omission or inaccuracy. Defendant cannot take the position that he was never presented with an account and, at the same time, contend that the account was inaccurate. An examination of the record leads us to the conclusion that defendant never seriously questioned or challenged the account, but allowed it to run along through these many years, assenting thereto, and that he promised to pay it on several occasions but failed so to do.

We are accordingly of opinion that the judgment order and decree of the chancellor should be affirmed, and it is so ordered.

JUDGMENT ORDER AND DECREE AFFIRMED.

Scanlan, P. J., and Sullivan, J., concur.

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[illegible]

and degrees of responsibility shall be ascertained
by the court.

Very truly yours,
J. Edgar Hoover

Scanned with a digital camera

41653

LIBERTY NATIONAL BANK OF CHICAGO,
as trustee under the provisions
of a trust agreement dated the
11th day of April, 1940, and known
as Trust No. 2961,

Appellee,

v.

MONTGOMERY J. ATKINSON,

Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

313 I.A. 263

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

March 12, 1940, 743 Brompton Ave. Apts., Inc., made a lease with the defendant, Montgomery J. Atkinson, for an apartment to be used as a private residence or dwelling on premises known as 755 Brompton avenue, Chicago, for the term commencing May 1, 1940, and expiring April 30, 1941, at a stipulated rental of \$50 a month. Defendant never entered into possession of the apartment for reasons hereinafter set forth. In September, 1940, plaintiff, as assignee of the original lessor, by statement of claim and cognovit filed in the Municipal court, had judgment against defendant for \$237.50 and costs, being rent for the months of June to September, 1940, inclusive, interest and attorneys' fees. After issuance of execution, defendant duly appeared and, by written motion supported by his affidavit and that of his wife, Beatrice E. Atkinson, moved the court to open the judgment by confession, to stay execution thereof, and to allow defendant a trial by jury. The motion was denied, and thereafter the further motion of defendant to vacate or set aside the order overruling his prior motion, was likewise denied. This appeal is prosecuted to reverse the court's ruling on these motions.

The sole question presented is whether the affidavits of defendant and his wife, in support of defendant's motion to open the judgment by confession, disclosed a prima facie defense on the

merits to the whole or a part of plaintiff's demand. This requires a consideration of the pleadings presented. The material portions of defendant's affidavit may be summarized as follows: He alleged that March 1, 1940, through his wife, acting as his agent, he entered into negotiations with the original lessor corporation, for the leasing of the apartment in question, through one Mrs. Landmann, who is also the wife of the janitor of the building, acting as agent for lessor; that before inspecting the apartment Mrs. Atkinson made extensive inquiries of the agent with respect to the health of the then tenants occupying the apartment during their tenancy, and when informed by the agent that the then tenants had lived there for only one year, Mrs. Atkinson also made extensive inquiries of the agent with respect to the health of the tenants who occupied the apartment immediately prior to the then tenants, and informed the agent that she would not be interested in the renting of the apartment if any one had been sick or had died there during its occupancy; that in answer to these inquiries the agent Mrs. Landmann, "for the purpose of inducing affiant to lease said apartment, falsely informed and represented to affiant's wife that there had been no sickness or death in said apartment during the occupancy of the same by the then tenants thereof, or during the occupancy of the same by the tenants occupying said apartment prior to the then tenants thereof;" that Mrs. Atkinson, on the faith of the agent's statements, "and relying implicitly upon the same, and believing the same to be true," caused defendant to pay a ten-dollar deposit for the rental of the apartment, and thereafter to execute the lease in question; that April 24, 1940, when defendant was about to enter into possession of the apartment, he was informed by Mrs. Landmann that the tenants therein desired to remain on the premises until May 9, and he was requested by her to delay occupying the apartment until that date; that upon receiving

...to the whole of the building...
...a consideration of the...
...portions of defendant's...
...He alleged that...
...agent, he entered into negotiations...
...corporation, for the leasing of the...
...through one Mrs. Landmann, who is also the wife of the landlord...
...of the building, acting as agent for Landmann; that before negotiating...
...the apartment Mrs. Landmann made extensive inquiries of the agent...
...with respect to the health of the then tenants occupying the apart-
...ment during their tenancy, and when informed by the agent that the...
...then tenants had lived there for only one year, Mrs. Landmann also...
...made extensive inquiries of the agent with respect to the health...
...of the tenants who occupied the apartment...
...then tenants, and informed the agent that one...
...in the renting of the apartment at any one time and also or had died...
...there during its occupancy; that in view of the fact that the...
...agent Mrs. Landmann, "for the purpose of inducing Landmann to lease...
...said apartment, falsely informed and represented to Landmann that...
...that there had been no sickness or death in the apartment during...
...the occupancy of the same by the then tenants, and that...
...the occupancy of the same by the then tenants occupying said...
...prior to the then tenants' occupancy," and Mrs. Landmann, on the...
...faith of the agent's statements, and...
...same, and believing the same to be true, caused defendant to pay...
...a ten-dollar deposit for the rental of the apartment, and there-
...after to execute the lease for the term of one year, to wit, from...
...defendant was about to enter into possession of the apartment, he...
...was informed by Mrs. Landmann that the then tenants...
...remain on the premises until May 1, and in view of the fact that...
...delay occupying the apartment until that day, the agent representing

this request, defendant asked Mrs. Landmann whether the delay of the tenants in vacating was caused by sickness in the family, and Mrs. Landmann replied in the negative; that defendant then and there informed her that it would be necessary for him to move in May 1 and April 25, the day following his conversation with Mrs. Landmann, he informed lessor, by letter of that date, that it would be necessary for him to have possession May 1; that in preparation for forcible entry and detainer proceedings against the tenant, he telephoned the occupant of the apartment, who told him that he was unable to yield possession because the apartment had been quarantined by the board of health on account of scarlet fever, which his son had contracted, and the occupant at the same time informed defendant that the apartment had twice before been quarantined during his occupancy for contagious diseases, and it is alleged that this information first came to him May 1, 1940, in the course of his conversation with the then occupant of the premises; that defendant immediately thereafter verified the fact with respect to these three quarantines by inspection of the records at the Chicago Board of Health, and from the records ascertained that the representations of Mrs. Landmann that there had been no sickness in the apartment during the occupancy of the then tenant were false and fraudulent; that upon learning these facts, defendant immediately notified counsel for lessor that the lease which defendant had executed was null and void and that he would not occupy the leased apartment and thereafter, in a conference with counsel for the lessor, at which the president of lessor corporation was present, he repeated what he had previously written. Subsequently defendant demanded return of his deposit and one month's rent, which he had paid after executing the lease, but his request was never complied with.

Beatrice E. Atkinson's affidavit alleged that she is defendant's wife; that she had read the affidavit of defense

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of the building is not in a
and Mrs. Landman, who is the
and Mrs. Landman, who is the
move in my mind, I am sure
with Mrs. Landman, who is the
that it could be necessary
in preparation for the future
the tenant, no complaint
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prepared by her husband, knew the contents thereof, and knew of her own personal knowledge that all the allegations therein contained with respect to acts or things done by her, acting as agent for her husband, were true, in substance and in fact.

Plaintiff's counsel argue that the affidavits were defective principally for the threefold reason that (1) they do not conform to the requirements specified by rules 76 (2) and 73 (1) of the Civil Practice Rules of the Municipal Court of Chicago, effective July 1, 1940; (2) defendant did not allege the essential element of scienter in his motion and supporting affidavits and thus failed to disclose the prima facie defense required by Rule 76 (2); and (3) the representations were not material.

With respect to the first two contentions it is argued that defendant's affidavit was defective because the affiant, if sworn as a witness, could not testify competently to the matters alleged therein, since, under the rules, affidavits in support of a motion are required to be made on the personal knowledge of the affiants. However, counsel overlooks that portion of rule 73 (1), which provides that "If all the facts to be shown are not within the personal knowledge of one person, two or more affidavits shall be used." We think the two affidavits, taken together, fully satisfy the requirements of the rule.

Various contentions are made with respect to the necessity for alleging the essential elements of scienter, and considerable space is devoted in both briefs to that subject. However, we find in par. 3 of defendant's affidavit the allegations of answers which Mrs. Landmann gave concerning the health of the tenants occupying the apartment immediately prior to the then tenants thereof and we regard these as sufficient. In addition thereto it is alleged "That in answer to said inquiries said agent, for the purpose of inducing affiant to lease said apart-

prepared by him, and that he had not prepared her own personal statement. He stated that he had not been retained with respect to the case, and that he was not an agent for her husband, and that he was not a partner in the business.

He stated that he had not been retained with respect to the case, and that he was not an agent for her husband, and that he was not a partner in the business. He stated that he had not been retained with respect to the case, and that he was not an agent for her husband, and that he was not a partner in the business. He stated that he had not been retained with respect to the case, and that he was not an agent for her husband, and that he was not a partner in the business.

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ment, falsely informed and represented, etc." It was held in Farwell et al. v. Metcalfe, 61 Ill. 372, that "Where false statements are made, with intent to deceive and defraud, the necessary implication is, that the person making such false statements, with such intent, has a knowledge of their falsity. Otherwise the false character of the representations, and the intent to deceive, could not coexist."

With respect to the materiality of the representations, we think the case of Fuller v. DePaul University, 293 Ill. App. 261, is expressive of the general rule. In that case suit was brought against a Catholic university by a teacher for alleged breach of an oral contract of employment. The undisputed evidence disclosed that plaintiff had made intentional concealments of the fact that he had been a Catholic priest, had subsequently left the priesthood, marrying and becoming the father of two children, and was at the time of the suit what is termed a "fugitive". The court held that these concealments amounted to material and fraudulent misrepresentations, and that his silence as to these things was a deception which induced defendant to employ him. Quoting from 13 C. J. 390, sec. 294, the court adopted the general rule that matters are always material which, if they had been known to be false, would not have resulted in the contract entered into. The affidavits presented by defendant and his wife allege that they made special inquiry with reference to the health of tenants who had occupied the apartment before the lease was executed, and it is definitely alleged that Mrs. Atkinson advised the agent of the lessor that she would not be interested in leasing the apartment if there had been any sickness or death on the premises prior thereto. The trial court evidently overruled defendant's motion to open the judgment on the ground that the

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the 1950's, the views of individual scholars on structuralism

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statements, which are intended to be taken into account by the court.

Otherwise the film character of the town is lost.

1. The first of these is the fact that the system of taxation is not uniform. The rate of tax varies from 10% to 20% and the amount of tax varies from 10% to 20% of the value of the property.

we think the case of "Liber v. Delaney" is a good one to start with.

For the purpose of this study, the following hypotheses were formulated:

— 11 —

100-443887-1000

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

[illegible]

...and the

of Ludwig, and of course, as a result, the two sides "evaporated."

allegations contained in the supporting affidavits as to the fraudulent representations of the agent of the original lessor, in procuring or inducing the execution of the lease in question here, were not misrepresentations as to a material fact. However, sufficient showing is made in the affidavits that defendant and his wife were sensitive and apprehensive about occupying an apartment in which former tenants may have been afflicted with contagious disease; and while such attitude may seem immaterial or fanciful to some, the fact that the prior tenants had been quarantined with contagious diseases on two prior occasions, if known to defendant and fully disclosed before the lease was executed, would, in view of the allegations in the affidavits, probably have resulted in the refusal of the defendant to lease the premises.

We think the motion to open the judgment by confession should be allowed and defendant given an opportunity to present his defense. The orders appealed from are therefore reversed and the cause remanded with directions to open the judgment, to stay the issuance of execution or any supplementary proceedings based on the judgment, to allow defendant's demand for trial by jury, and proceed with the hearing on its merits.

ORDERS REVERSED AND CAUSE
REMANDED WITH DIRECTIONS.

Scanlan, P. J., and Sullivan, J., concur.

41664

AUGUST GROSS, PETER CIOLAC
and RUDOLPH TEEGEN,
Appellees,

v.

VILLAGE OF NILES, a Municipal
Corporation, VILLAGE OF NILES
CENTER, a Municipal Corporation,
and EDWARD O. CLARK,
Appellants.

22
80
APPEAL FROM CIRCUIT
COURT, COOK COUNTY.

313 I.A. 263²

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiffs brought an action in tort for damages occasioned by the alleged negligence of defendants, two of which are corporate villages, in causing or permitting a certain culvert, situated within the territorial limits of both villages, to become and remain obstructed to drainage, whereby plaintiffs' farm lands, drained by said culvert, became flooded, resulting in damage to standing and prospective crops because of injury to the soil. The case was tried by the court and a jury, resulting in the following verdict: "We the jury have not and cannot now agree upon a verdict herein." The jury was thereupon discharged. Defendants had entered three motions in the course of the trial: one for a directed verdict at the close of plaintiffs' evidence; another for a directed verdict at the close of all the evidence; and one for judgment as if the requested verdict had been directed. All the motions were overruled in a consolidated order entered subsequent to the trial. Defendants appeal from that order, which they designate as the "final judgment".

After defendants had perfected their appeal plaintiffs here moved for dismissal thereof on the ground that the order was not final but interlocutory, contending that it did not constitute such a final judgment as is appealable under the provisions of the Civil Practice Act (An Act in Relation to

AUGUST GROSS, BETTY GROSS,
and ROBERTA GROSS,
Appellants,

v.

VILLAGE OF WILLES, a Municipal
Corporation, VILLAGE OF WILLES
CENTER, a Municipal Corporation,
and EDWARD O. CLARK,
Appellees.

IN THE COURT OF APPEALS
OF THE STATE OF NEW YORK

1958

MR. JUSTICE PRINCE DELIVERED THE OPINION OF THE COURT.

Plaintiffs brought an action in tort for damages occasioned by the alleged negligence of defendants, two of which are corporate villages, in causing or permitting a certain culvert, situated within the territorial limits of both villages, to become and remain obstructed so drainage whereby plaintiffs' farm lands, situated by said culvert, became flooded, resulting in damage to growing and prospective crops because of injury to the soil. The case was tried by the court and a jury, resulting in the following verdict: "The jury have not and cannot now agree upon a verdict herein." The jury was then discharged. Defendants had entered three motions in the course of the trial: one for a directed verdict at the close of plaintiffs' evidence; another for a directed verdict at the close of all the evidence; and one for judgment as if the proposed verdict had been entered. All the motions were overruled in a consolidated order entered subsequent to the trial. At the time of the trial, which they designate as the "final judgment," after defendants had paid the costs of the trial, plaintiffs here move for dismissal of the action on the ground that the order was not final but interlocutory, notwithstanding that it is not consistent with a final judgment; it is a final judgment under the provisions of the Civil Practice Act (as amended) relating to

Practice and Procedure in the Courts of this State, approved June 23, 1933, ch. 110, Ill. Rev. Stat. 1939) and particularly under sec. 77 (par. 201, p. 2437) thereof, and therefore this court is without jurisdiction to entertain the appeal. That motion was reserved to hearing. We think the motion to dismiss must be sustained for the following reasons: The law is well settled that a judgment or decree is final and reviewable when it terminates the litigation on the merits of the case and determines the rights of the parties. Dunavan v. Industrial Comm., 355 Ill. 444, citing Tribune Co. v. Emery Motor Livery Co., 338 Ill. 537, Peabody Coal Co. v. Industrial Comm., 287 Ill. 407, and Rosenthal v. Bd. of Education, 239 Ill. 29. In People v. Stony Island Savings Bank, 355 Ill. 401, it was held that a decree is appealable only when it terminates the litigation between all the parties on the merits and when, if affirmed, the court which rendered it has only to proceed with its execution.

In the case at bar none of the rights or liabilities of any of the parties were determined or adjudicated by the order from which the appeal is prosecuted, denying the respective motions of defendants for directed verdicts. The case on the merits is still pending and the issues thereof are wholly undetermined and subject to retrial, having the same status as before the original trial had begun. The verdict of the jury failed to settle any of the issues in controversy. On retrial defendants may prevail, thus obviating the necessity for an appeal, or plaintiffs may abandon, dismiss or discontinue their case, or on retrial the court may sustain motions for directed verdicts on evidence then adduced by plaintiffs on the hearing.

A similar situation was presented in LeMenager v. Northwestern Barb Wire Co., 296 Ill. App. 568, where an appeal

... and ... in the ... of ...
June 22, 1933, of ...
under sec. 77 (Gen. St. 1933) ...
court is without jurisdiction to grant the ...
motion was reserved to hearing. ...
must be sustained for the following reasons: ...
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it terminates the litigation on the merits of the case and ...
mines the rights of the parties. United v. Industrial Corp.,
355 Ill. 444, citing Priddy v. Priddy, 100 Ill. 404, 100
Ill. 404, 100 Ill. 404, 100 Ill. 404, 100 Ill. 404, 100
Rosenberg v. Bd. of Education, 339 Ill. 401, 339 Ill. 401, 339
Island Savings Bank, 339 Ill. 401, 339 Ill. 401, 339 Ill. 401, 339
appealable only when it terminates the litigation between all the
parties on the merits and when, in ...
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was taken from an order denying defendant's motion for judgment notwithstanding the verdict, pursuant to the provisions of section 68 (par. 192, p. 2428, ch. 110, ^{Ill.}Rev. Stat. 1939) of the Civil Practice Act. In dismissing the appeal because the order was not final and therefore not appealable but only interlocutory, the court said that "An appeal from the verdict of a jury will not lie. [Citing cases.] There must be a judgment entered on the verdict before there can be a review thereof. The verdict of a jury before it has received the sanction of the court, by passing into a judgment, is not subject to review on appeal in actions such as the present one. *** Hence a judgment in this case could not be regarded as final for purposes of appeal until it had been entered in such a manner that execution might issue thereon."

For the reasons given the motion of plaintiffs to dismiss the appeal is sustained and the appeal is dismissed.

APPEAL DISMISSED.

Scanlan, P. J., and Sullivan, J., concur.

41682

GOLDIE BUEHLER,
(Petitioner) Appellee,

v.

ALBERT C. BUEHLER,
(Respondent) Appellant.

23
APPEAL FROM SUPERIOR COURT,
COOK COUNTY.

313 I.A. 264'

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

This is one of three appeals arising subsequent to the entry of a divorce decree by the Superior court October 20, 1937, in favor of Goldie Buehler, petitioner, against Albert C. Buehler, respondent. The decree was predicated on grounds of cruelty. Petitioner's permanent alimony was fixed at \$175 a month and an additional \$75 a month for each of the two children whose custody was awarded to her. The custody of two other children was awarded to respondent. Mrs. Buehler was given all the household goods and an equal interest with respondent in the home occupied jointly by the parties. Petitioner's attorneys were awarded \$4,500 solicitors' fees. On appeal from that decree to the Appellate court the amount of solicitors' fees was increased \$1,500, she was allowed \$1,000 as solicitors' fees for services rendered after the entry of the decree and including the appeal to the Appellate court, her permanent alimony was increased to \$300 and she was awarded custody of the youngest child, which, under the decree, had been awarded to respondent, with support allowance of \$75 a month. (Buehler v. Buehler, 305 Ill. App. 609.) Subsequently, respondent filed a petition in the Supreme Court of Illinois for leave to appeal from the order of the Appellate court, which was allowed, and, in an opinion filed April 10, 1940 (Buehler v. Buehler, 373 Ill. 626), the Supreme Court reversed the Appellate court in so far as it had modified the decree of the Superior court and affirmed the final decree there entered. A petition

for rehearing was later denied by the Supreme court, rendering the decree of the Superior court final and conclusive.

While the petition for leave to appeal was pending in the Supreme court, Mrs. Buehler, June 30, 1939, filed a petition in the Superior court alleging that she desired to file an answer to the petition for leave to appeal, that further proceedings may be required in the Supreme court in connection with the petition for leave to appeal and her answer thereto, that it had become necessary to employ counsel to prepare such answer, to pay appearance fee, printers' bills, cost of additional transcript and possible other outlays, and to attend to further proceedings in the Supreme court; and she asked that respondent be ruled to pay reasonable suit money and attorneys' fees in connection with proceedings then pending in the Supreme court.

In his answer to this petition, filed July 14, 1939, respondent averred that the petition was prematurely filed; that under par. 16, chap. 40, Ill. Rev. Stats. 1937, "In case of appeal by the *** wife, the court in which the decree or order is rendered may grant and enforce the payment of such money for her *** defense *** during the pendency of the appeal as to such court shall seem reasonable and proper" (italics ours); that it was apparent from the face of the petition that no appeal was then pending, since, if leave to appeal should be denied, there would be no occasion for further proceedings; and respondent accordingly asked that the petition be stricken.

July 21, 1939, the court entered an order on the petition and answer, requiring respondent to pay petitioner, for and on account of attorneys' fees and costs to defend the petition then pending in the Supreme court, the sum of \$250 within fifteen days thereafter.

In obedience to this order respondent's counsel, August 4, 1939, addressed a letter to Mrs. Buehler's attorney, enclosing

for rehearing was a 100% order. The degree of the objection being that it was not a 100% order.

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The Supreme Court, in its decision, said that the degree of the objection being that it was not a 100% order.

in the objection being that it was not a 100% order, the degree of the objection being that it was not a 100% order.

to the petition for leave to appeal, the degree of the objection being that it was not a 100% order.

be required in the Supreme Court in a petition for leave to appeal, the degree of the objection being that it was not a 100% order.

for leave to appeal, the degree of the objection being that it was not a 100% order, the degree of the objection being that it was not a 100% order.

necessarily to employ counsel to prepare and present the appeal, the degree of the objection being that it was not a 100% order.

appearance for, printed, filed, and served on the respondent, the degree of the objection being that it was not a 100% order.

and possible other evidence, and on the basis of the evidence, the degree of the objection being that it was not a 100% order.

in the Supreme Court, the degree of the objection being that it was not a 100% order, the degree of the objection being that it was not a 100% order.

pay reasonably and promptly, the degree of the objection being that it was not a 100% order, the degree of the objection being that it was not a 100% order.

proceedings than pending in the Supreme Court, the degree of the objection being that it was not a 100% order, the degree of the objection being that it was not a 100% order.

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respondent averred that the degree of the objection being that it was not a 100% order, the degree of the objection being that it was not a 100% order.

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check for \$250 "to be applied upon such indebtedness as may ultimately be determined to be due from Mr. A. C. Buehler to Mrs. Goldie Buehler under and pursuant to divorce decree which may ultimately and finally be entered in this proceeding, including attorney's fees." The letter stated that payment was being made without prejudice to the rights of either party and to any claim which either Mr. or Mrs. Buehler might thereafter assert in the proceeding and that it was not to be considered as any waiver of error by either of the parties in interest.

October 31, 1939, Mrs. Buehler filed another petition in the Superior court reciting the decree, the modification thereof by the Appellate court, the order of the Supreme court allowing the appeal from the Appellate court, and alleging that in the ordinary course of the hearing on the latter appeal she would be required to file printed briefs and arguments and to probably appear before the Supreme court by her counsel on oral argument of the cause; that in order to properly defend the appeal by respondent she would be required to employ counsel and compensate them for their services; that she was without income or funds other than those being paid to her by respondent under the order and decree of the Superior court, and was therefore unable to compensate her attorneys unless respondent should be ordered to pay her a reasonable amount for such purposes; and she therefore sought an order on respondent to pay her for her attorneys such compensation for services as, in the judgment of the court, would be reasonable and proper.

No order was entered on this petition, but after the Supreme court had filed its opinion April 10, 1940, Buehler v. Buehler, 373 Ill. 626, Mrs. Buehler had leave to file a further petition June 12, 1940, wherein she recited the proceedings had in the Supreme court and alleged that she was put to considerable expense, which is

itemized in statement attached to petition as exhibit "B"; that as a result of this proceeding the matter had been finally disposed of by the Supreme court, which reversed the Appellate court insofar as it had modified the decree of the Superior court and affirmed the decree of the Superior court in all respects; that a reasonable, usual and customary compensation to attorneys for services such as were rendered by her counsel in the matter of the appeal to the Supreme court, was \$4,500; that July 21, 1939, she had presented to the Superior court a petition for allowance of her attorneys' fees in the matter of defending against the petition for leave to appeal in the Supreme court, pursuant to which the court had awarded her \$250 on account for attorneys' fees and outlays, which amount was paid by respondent; and she asked that an order be entered in the Superior court directing and requiring respondent to pay her \$4,500, or such sum as the court might adjudge to be reasonable, usual and proper, together with the aggregate of \$201.50, which she had laid out and expended in defending the Supreme court proceeding. There was attached to this petition an itemized statement of services rendered by Mrs. Buehler's counsel, aggregating 216 hours, in addition to one day spent in making the oral argument before the Supreme court, and itemized bills for printing briefs, and traveling expenses to Springfield, in the sum of \$201.50.

Respondent's answer to this petition filed June 20, 1940, admitted that legal services had been rendered by counsel for Mrs. Buehler in the Supreme court, but disclaimed any knowledge as to the extent or necessity of the services; he denied that \$4,500 was the reasonable, usual and customary compensation and that petitioner was entitled to an order directing him to pay any sum whatsoever on account of services; he averred that the Supreme court in Buehler v. Buehler, supra, had specifically held "that petitioner is not entitled to fees on appeal in this case where she did not defend

the order or decree of this court, but was attempting to reverse and set aside the order and decree of this court;" that the Superior court was not the court in which the decree or order was rendered from which an appeal was taken by respondent, but that the decree from which he appealed was rendered by the Appellate court, and that respondent never appealed from the decree of the Superior court, but has at all times attempted to sustain and defend that decree. The answer sets forth the pertinent provisions of par. 16, chap. 40, Ill. Rev. Stats. 1939 upon which he predicates the contention that the Superior court was without jurisdiction to enter an order requiring him to pay fees for services rendered in the Supreme court, and he asked that the prayer of the petition be disallowed.

Respondent had leave to amend his answer to the petition filed June 12, 1940, by an allegation that Mrs. Buehler had prosecuted a cross appeal to the Supreme court and assigned cross errors on all matters except one upon which respondent assigned errors in the Supreme court; that a substantial portion of the services rendered by petitioner's counsel in the Supreme court was on matters in no way connected with the prosecution of the appeal from the Appellate court, but was directed to the cross errors assigned; and therefore petitioner was not, under the statute, entitled to any attorneys' fees or defense money for services rendered to her by her attorneys, or any other expenses incurred in connection with the Supreme court proceeding.

Pursuant to the hearing of the amended petition and answer, "upon evidence adduced by the plaintiff in support of such petition, and upon argument of counsel, both on behalf of the plaintiff and the defendant," the court found, among other things, from the testimony of the attorneys representing Mrs. Buehler, "that subsequent to the allowance of the petition for leave to appeal, not to

exceed ten per cent (10%) of the time and labor spent by them in connection with the appeal in the Supreme court of Illinois, as shown on the statement attached to plaintiff's petition for fees, was exclusively in support of or in connection with her cross errors; that the balance of the time and labor spent, as shown on said statement, was in support of or in defense of the judgment of the Appellate Court" (italics ours); that the usual and proper compensation for services necessarily rendered amounted to \$1,915, and the amounts necessarily laid out and expended by petitioner in connection with the appeal to the Supreme court, exclusive of such amounts as were expended in connection with cross errors, amounted to \$185. Accordingly, the court ordered respondent to pay petitioner the aggregate sum of \$2,100. Respondent appeals from the order entered.

It may be conceded that, in the absence of specific statutory authority, courts in this state have no jurisdiction to award solicitors' fees to the contesting parties. Smith v. Johnson, 321 Ill. 134. The controversy here arises over the construction of par. 16, chap. 40, Ill. Rev. Stats. 1939, which provides: "In case of appeal by the husband or wife, the court in which the decree or order is rendered may grant and enforce the payment of such money for her or his defense and such equitable alimony during the pendency of the appeal as to such court shall seem reasonable and proper." It is first urged by respondent that where an appeal is taken by the husband or wife, only the court in which the decree or order is rendered may grant and enforce payment of suit money, and his counsel say that since respondent was not appealing from the decree or order of the Superior court, but from the decree or order of the Appellate court, the statute afforded no authority to the Superior court to allow fees for services rendered in the Supreme court proceeding. The implication of this argument is that since respondent was

appealing from the decree of the Appellate court, only that court could grant or enforce payment of money for the defense interposed by Mrs. Buehler in the Supreme court, but obviously that is not the intent of the statute, for the court said in Buehler v. Buehler, 373 Ill. 626, that "No authority has been furnished authorizing the Appellate court to fix solicitors' fees where the wife prosecutes the appeal," and that under the statute only the court in which the decree or order is rendered may require payment of money for the wife's or husband's defense pending the appeal. The order appealed from was entered by "the court in which the decree or order is rendered," namely, the court in which the decree of divorce was rendered. In Harding v. Harding, 205 Ill. 105, which was one of several appeals taken from various portions of the decree in that proceeding, Harding, the husband, appealed first to the Appellate court, and, by further appeal, brought the case to the Supreme court. During the pendency of these appeals the wife filed a petition in the Circuit court for the allowance of solicitors' fees "for services rendered in prosecuting them [the two appeals]," and it was contended that the Circuit court was without jurisdiction to entertain the petition, but the Supreme court held that the "contention is without merit."

It is next argued that the statute confers jurisdiction to allow defense money only where it is "'for her DEFENSE of the decree or order of the court' rendering such decree or order appealed from." Two cases are cited in support of this contention: Seeger v. Seeger, 154 Ill. App. 38; Shaffer v. Shaffer, 219 Ill. App. 200. In the Seeger case the husband brought suit for divorce against his wife on the ground of extreme and repeated cruelty, and had a decree in his favor. The wife appealed and the court held that it was not improper for the court to deny suit money for the purpose of allowing her to prosecute an appeal, especially since she had means of her own and had been the recipient of an antenuptial settlement. In the Shaffer case the wife's bill for divorce

was dismissed for want of equity and then she appealed. The court held that under the statute she was not entitled to an order, pending the appeal from the decree against her, requiring her husband to pay alimony, solicitor's fees and costs. Neither of these decisions throws any light on the question here presented. Mrs. Buehler, who filed the complaint in the Superior court, had a decree in her favor granting a divorce, the allowance of alimony and support for the children placed in her custody, solicitors' fees and the settlement of her property rights. By her appeal to the Appellate court she sought a modification of the Superior court decree. The Appellate court, having modified the decree in several respects but not in respect to the principal relief sought, namely, the severance of the marital relationship between the parties, remanded the cause with directions to amend the decree in conformance with its views, and respondent then prayed and had leave to appeal to the Supreme court from the order of the Appellate court, where he obtained an order which was nothing more, in effect, than the reversal of the modifications made in the Appellate court order and the affirmance of the decree of the Superior court. The appeal to the Supreme court was prosecuted by the respondent, and it cannot well be argued that Mrs. Buehler appealed from the judgment of the Appellate court, for she was satisfied with the order here entered, at least to the extent of not desiring to appeal. When the petition for leave to appeal was filed in the Supreme court, she opposed that petition and was, in fact, seeking to defend the order of the Appellate court, except as to some cross errors, which she would, of course, not have had occasion to urge if respondent had not prosecuted the appeal to the Supreme court. The judgment of the Appellate court as it was rendered by its order of reversal merely superseded, in part, the judgment of the Superior court, which was thereby modified to the extent of that reversal, and when respondent appealed to the Supreme court, petitioner was

faced with the necessity of defending against that appeal. The fact that the Supreme court afterward reversed the judgment of the Appellate court affords no reason for denying petitioner suit money and attorneys' fees. Jenkins v. Jenkins, 81 Ill. 167.

Mrs. Buehler's counsel argue, with considerable force, that respondent is in no position to question the authority of the Superior court to allow attorneys' fees and suit money in the Superior court proceeding, because the order of July 21, 1939, from which no appeal was prosecuted, is res adjudicata, and that the court did have such authority. That order was entered pursuant to the first petition filed by Mrs. Buehler, while the petition for leave to appeal to the Supreme court was still pending and before the court had indicated whether or not it would allow the petition for leave to appeal. Respondent opposed the allowance of fees at that time and interposed an answer in which he asked that the petition be stricken. Nevertheless, the court entered an order on the petition and answer, requiring respondent to pay, for and on account of attorneys' fees and costs to defend the petition then pending in the Supreme court, \$250. Respondent complied with this order by paying the stipulated sum, with certain reservations hereinbefore set forth, and although the order then entered made provision for an appeal therefrom by ordering "that the defendant is allowed 90 days in which to present a report of proceedings" and "In event of notice of appeal" fixed the bond at \$500, respondent never exercised his right to question the jurisdiction of the court to enter an order under par. 16, chap. 40 of the Revised Stats. of Ill. 1939 by appealing from that order. Thereafter, Mrs. Buehler filed another petition on October 31, 1939, advising the court that the petition for leave to appeal had been allowed by the Supreme court and finally, on June 12, 1940, after an opinion had been rendered in the Supreme court, she asked for

the allowance of fees and specified the details of the services rendered and the money expended in defending the appeal. We think that the original order of July 21, 1939, allowing petitioner \$250 on account of attorneys' fees and costs to defend the petition in the Supreme court, constituted an adjudication, fixing the rights of the parties in the matter of fees for attorneys' services in defending against respondent's appeal, and that in the subsequent hearing and order entered thereon, the court merely exercised the right to pass upon the value of the services of petitioner's counsel, for which an award of \$250 had been made on account in the original order. Respondent's counsel say that the principle of res adjudicata is not applicable because the court had no jurisdiction of the subject matter to allow fees, and the order entered July 21, 1939, therefore could not be an adjudication of the parties' rights. In view of our conclusion that the court had jurisdiction under the statute, and our construction of the statute, as heretofore indicated, this contention is untenable.

Lastly it is urged that the award was excessive, since, in any event, fees should not be allowed petitioner for prosecution of her cross errors in the Supreme court. Respondent's counsel say that the evidence was vague and uncertain as to the proportionate time spent for defending the appeal and the prosecution of cross errors assigned by petitioner. Mrs. Buehler's attorneys testified that the time devoted to the prosecution of cross errors constituted less than 10 per cent of the services rendered in the Supreme court. The chancellor, in his order for the allowance of fees, found "that subsequent to the allowance of the petition for leave to appeal, not to exceed ten per cent (10%) of the time and labor spent by them in connection with the appeal in the Supreme court of Illinois, as shown on the statement attached to plaintiff's petition for fees, was exclusively in support of or in connection with her cross errors; that the balance of the time and labor spent, as shown on said state-

ment, was in support of or in defense of the judgment of the Appellate court." There was no countervailing proof and the record sustains this finding. However, the allowance of fees was based primarily on a time basis. The statement attached to the petition showed that 216 hours and one extra day for oral argument had been devoted to the appeal in the Supreme court.

This was equivalent to more than 30 days. Petitioner's brief in the Supreme court involved the same facts and substantially the same propositions of law as were argued in the Appellate court appeal, and counsel for petitioner were thoroughly familiar with both the facts and the law. In our former opinion we expressed the view that \$1,000 would amply compensate petitioner's counsel for the services rendered in the appeal to the Appellate court. Although we had no time basis for arriving at this conclusion, we were sufficiently informed of the questions involved and the character of the services required to express judgment as to the value of these services, and it seems to us the amount of \$1,000 would fairly compensate petitioner's counsel for defending the appeal in the Supreme court, involving the same subject matter and questions of law.

The order of the Superior court is, therefore, affirmed in all respects except as to the amount of solicitors' fees, and as to such amount, it is reversed and the cause remanded with directions that the order be modified so as to award petitioner \$1,000 as fees for her solicitors in the Supreme court proceeding, and the additional sum of \$185 for expenses incurred.

ORDER OF THE SUPERIOR COURT PARTLY
AFFIRMED AND PARTLY REVERSED WITH
DIRECTIONS.

Scanlan, P. J., and Sullivan, J., concur.

ment, was in a state of confusion of mind, and
 applicant's counsel, who was present, was unable to
 record statements of the facts. The statement
 was passed by the court, and the court
 the petition should be granted. The court
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 for her relief. The court is of the opinion
 at sum of \$1,000 for expenses.

41699

CARL ROEHRI and MARIE ROEHRI,
copartners trading as FEDERAL
DIE CASTING COMPANY,
Appellees,

v.

WILLIAM SCHWALGE, trading as
RECLAIMO MANUFACTURING COMPANY,
Appellant.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

313 I.A. 264²

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Carl and Marie Roehri, copartners trading as Federal Die Casting Company, brought suit for a balance of \$278.35 and interest, alleged to be due on an account for the manufacture of dies and die casting parts for an oil filter invented and manufactured by defendant William Schwalge, trading as Reclamo Manufacturing Company. Defendant interposed a counterclaim contending that the castings were not suitable for the purpose intended, that plaintiffs committed a breach of warranty, resulting in damages to him in excess of plaintiffs' claim for which he asked judgment. The cause was tried by the court without a jury, resulting in findings and judgment in favor of plaintiffs on their statement of claim for \$286.69 and costs, and against defendant on his counterclaim, which the court dismissed. Defendant seeks a review and reversal of the order entered.

We find in defendant's brief no such concise statement as is required by Rule 7, Rules of Practice in the Appellate Court, and his counsel suggests "that no true or satisfactory impression of this matter can be gathered, without an examination of the entire record," which consists of more than 600 pages and is embraced in an abstract of record of 289 printed pages. However, from an examination of the pleadings and so much of the abstract as was necessary to afford an understanding of the

issues involved, the salient facts may be summarized as follows: Defendant had invented and was manufacturing an oil filter known as "Reclamo," which was attached to the manifold and used in connection with the operation of automobile engines. This filter had been made of aluminum. In the fall of 1938, one Robert J. Dunne, plaintiffs' sales engineer, called on defendant for the purpose of trying to get his sand casting business. Defendant told Dunne that he was changing some of the parts of his filter from sand to die castings, and requested Dunne to bid on the job. Prior thereto, defendant had become interested in die castings made from a white brass metal, commonly known as "Zamac," through his son, who had visited the Alloy Metal Show and told him about Zamac metal. Defendant wanted to change from sand to die castings to induce smoother operation of the mechanism and was, at the same time, interested in employing a different type of metal than aluminum. Two or three other die casting concerns were bidding for his work, all of them proposing to use a white brass metal. It was after bids had been received from the other concerns that Dunne called on defendant and requested some of his business.

As a result of Dunne's call, a contract was signed by the parties December 6, 1938. Thereafter, plaintiffs prepared a blueprint from a specimen part furnished by defendant, which was later approved by defendant, and the first sample part manufactured by plaintiffs was delivered January 13, 1939. After some changes were made, the second samples were delivered January 27 of that year. These samples were made of white brass metal and were approved by defendant, who, February 3, 1939, placed an order for 500 sets of parts, which were promptly made, and those parts, found on inspection by defendant to be defective, were thereafter replaced. Although the evidence does not disclose how many parts made up the filter or who manufactured them, plaintiffs were at

that time making three of the parts and the complete filters were assembled at defendant's plant. February 11, 1939, defendant ordered an additional 1,000 sets, on March 9 another 1,000 were ordered, and June 28 of that year a final order for 3,500 sets was placed with plaintiffs. All these orders were filled and shipped, the last installment of several hundred sets being received by defendant July 31, 1939.

Shortly after the first order was filled in February, 1939, and prior to the placing of any of the subsequent orders it was found that the parts supplied by plaintiffs melted under certain operating conditions. Although the white brass metal used had proved satisfactory under normal conditions, it was not capable of withstanding the severe heat emitted from the exhaust. Nevertheless, defendant continued to order more parts and paid for them after they were delivered. It is not contended that plaintiffs had any knowledge of the temperature at exhaust, although defendant had acquired such knowledge through tests made by him. Plaintiffs' only representation was that the melting point of white brass is approximately 750 degrees Fahrenheit. This is borne out by the evidence and no controversy arises over this fact. The difficulty came about through the unexpected heat of the motor at exhaust under severe driving conditions, and that was a matter with which plaintiffs were not conversant, but of which defendant is presumed, under the evidence, to have had knowledge.

It is contended that between the time that Dunne first called on defendant and December 6, 1938, when the contract was signed, defendant explained the operation of his filter and advised plaintiffs that it would be subjected to an exhaust heat of around 400 degrees Fahrenheit. On hearing, defendant admitted knowing that the manifold temperatures sometimes rise to 1,300

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degrees Fahrenheit, but this information was never conveyed to plaintiffs, and defendant never told them that he needed a metal which would be required to stand such heat. When the contract was signed, plaintiff Carl Roehri had no detailed information about the mechanism of the filter, and first learned how it operated after the second sample had been submitted. He testified that he then saw one of the filters installed.

As the result of the change from sand to die castings and the use of white brass metal, defendant received numerous complaints from customers, and it was then ascertained that the castings made by plaintiffs would not withstand the high temperatures generated under severe driving conditions. While it may well be true that defendant suffered considerable losses because of the change from aluminum to white brass, the question presented is whether plaintiffs should be held to account for the damages which resulted.

The balance due plaintiffs is not seriously disputed. The only issues presented to the court are whether plaintiffs expressly warranted the filter parts or whether, from the facts presented, a warranty is raised by implication of law. These issues were purely questions of fact which the court determined adversely to defendant. Although defendant discusses salient parts of the evidence, we find in his brief no point contending that the court's findings were contrary to the manifest weight of the evidence and we would, therefore, be justified in concluding that the findings ought not to be disturbed and that the judgment should be affirmed. However, from an examination of the record, we are satisfied that the evidence discloses no express warranties on the part of plaintiffs, and that the evidence does not give rise to a warranty implied by law.

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1939, upon which defendant relies, provides: "12. Definition of express warranty.] Sec. 12. Any affirmation of fact or any promise by the seller relating to the goods is an express warranty if the natural tendency of such affirmation or promise is to induce the buyer to purchase the goods, and if the buyer purchases the goods relying thereon. No affirmation of the value of the goods, nor any statement purporting to be a statement of the seller's opinion only shall be construed as a warranty." As heretofore set forth, plaintiffs made no express representations or warranty that the parts made by them, according to defendant's specifications, would not melt at high temperatures. White brass metal was well known to the trade, and defendant was familiar with its heat-withstanding capacity. The principal statement of fact attributed by defendant to plaintiffs was that the melting point of this metal was approximately 750 degrees Fahrenheit, and that it was stronger than aluminum. While it may be that these statements induced defendant to enter into the contract with plaintiffs and that defendant relied on them, the statements were evidently true and, therefore, no breach of warranty can well be claimed. It is doubtful, however, whether defendant actually relied on any statements made by plaintiffs, because the latter were not familiar with the mechanism of the filter when the contract was signed. Carl Roehri was in the die casting business, and had no knowledge of exhaust temperatures nor did he make any representations of such knowledge to defendant. On the other hand, defendant, who had conducted experiments in connection with the manufacture of his filter, had considerable familiarity with the melting points of various metals, and knowledge of the temperatures to which his device would be subjected under driving conditions and, therefore, it is difficult to conceive that he placed reliance on any representations that he claims plaintiffs made. Defendant contends that he was advised

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1939, for which the... of express warranty... any promise by the... warranty of the... is to ensure... purchase the goods... of the goods, nor any... the seller's opinion... heretofore set forth... or warranty that the... specifications, which... metal was well known... with its best-known... of fact established by... melting point of this... Fahrenheit, and that it... may be that these... the contract with... the statements were... warranty can only be... defendant's liability... became the latter... after when the contract... discharging liability... not in the... and... in connection with... liability... age of the... with driving conditions... relative to... claims of liability...

by plaintiffs to use this type of metal, but the record does not bear him out because he testified that he first became interested in white brass metal castings through his son, who had seen them at a metal show and told him about them. Moreover, several die casters had previously bid on castings and, according to the record, all the concerns bidding proposed to use the kind of metal which defendant had specified, namely, white brass. In view of these circumstances, we think the court properly found that there was no express warranty.

The contention that there was an implied warranty arises by virtue of subsection (1) of par. 15 of the statute (Ill. Rev. Stat. 1939, chap. 121-1/2), which provides: "(1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, and it appears that the buyer relies on the seller's skill or judgment (whether he be the grower or manufacturer or not), there is as [an] implied warranty that the goods shall be reasonably fit for such purpose." A finding that defendant had made known to plaintiffs the particular purpose for which these castings were required and that he relied on plaintiffs' skill or judgment, so as to raise an implied warranty that the goods shall be reasonably fit for such purpose, would not be warranted by the evidence. This oil filter was evidently composed of numerous parts, only three of which were made by plaintiffs, who had nothing to do with assembling them, and had never seen one installed until after the contract was signed. It was clearly incumbent on defendant to convince the court that he had made known to plaintiffs the particular purpose for which these castings were required. The evidence in this behalf is conflicting. Defendant contends that he explained to Carl Roehri how the machine operated; whereas, Roehri testified that he had never met defendant until after the contract was signed and that all he knew about the device was that it was an oil filter. The court would not have been justi-

by plaintiffs to bear him out in his in white brass... at a metal... casters had provided... all the concerns... defendant had... circumstances, no... no express warranty.

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fied in finding from the evidence that defendant relied on plaintiffs' judgment as to the proper metal to be used, for he knew that Carl Rhoehri had no knowledge about the temperature of motors at exhaust and made no representation that he had such knowledge. Moreover, there was the admission of defendant that other die casters had bid for the work before Dunne visited defendant's plant, and the further admission that defendant advised plaintiffs that their competitors were all figuring on the use of white brass. As inventor of the device, defendant had tested motor temperatures and had considerably more information on the subject than plaintiffs could possibly have. He evidently convinced the court of his knowledge on the subject by testifying to the melting points of metals and, through his testimony, indicating that he had attempted to cut down the heat entering the filter by the use of various devices, without consulting anyone, and certainly not plaintiff. There is the further circumstance that the sample of the castings required was submitted to plaintiffs, who prepared a blueprint therefrom, which was in accordance with defendant's specifications and was subsequently approved by defendant, and the contract entered into between the parties provides that the parts should be made of white brass metal, with which all the parties, including the competing bidders, had some familiarity.

In making his decision at the close of all the evidence, the court considered it significant that, after the first set of castings were made, delivered, and found to be incapable of withstanding the heat when exposed to severe driving conditions, defendant did not demand an explanation from plaintiffs, and the trial judge specifically pointed out in his oral opinion that this metal was well known to the trade, "anybody could find out about it, it was not Rhoehri's invention, it was something that was in use for many years." Nevertheless, after the unsatisfactory result experienced with the first castings made by plaintiffs, defendant placed, and received, two

or three more orders, and later stated in his letter to Roehri of June 13, 1939, that "somehow I feel that I am not entirely to blame," indicating that he certainly did not hold plaintiffs responsible, or not entirely so, for the substitution of white brass metal for aluminum.

We find no convincing reason for reversing the judgment of the Municipal court and it is, therefore, affirmed.

JUDGMENT AFFIRMED.

Scanlan, P. J., and Sullivan, J., concur.

of three more orders, and after that of June 13, 1939, that "covering" was not sufficient to blame," indicating that he was not held responsible, or not entirely so, for the attack. The press noted for statement.

We find no convincing reason for reversing the judgment of the Municipal court and it is, therefore, affirmed.

JUDGMENT AFFIRMED.

Seaborn, P. J., and Sullivan, J., concur.

41708

GOLDIE BUEHLER,

Appellee,

v.

ALBERT C. BUEHLER,

Appellant.

APPEAL FROM SUPERIOR COURT,

COOK COUNTY.

313 I.A. 265¹

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

This is the second of three appeals prosecuted by the defendant Albert C. Buehler from orders arising out of a decree entered in favor of Goldie Buehler, plaintiff herein, October 20, 1937. The decree granted plaintiff a divorce on the ground of cruelty, fixed her alimony, support for two of the children whose custody was awarded to her, allowed her fees for her solicitors and, among other things, awarded her and defendant equal interests in the residence at 151 Abingdon avenue, Kenilworth, Illinois, with the provision that the premises be sold as soon as convenient. The Continental Illinois National Bank was appointed appraiser to determine the value of the residence, and the court retained jurisdiction for the purpose of carrying out the sale. The bank declined to act as appraiser, and by agreement the Chicago Real Estate Board Appraisal Committee was appointed and placed a value of \$25,000 on the premises. Plaintiff was unable to sell the property at the appraised figure and thereupon defendant offered to purchase her interest less certain advancements made by him on account of interest, taxes and principal payments. There was a mortgage of \$15,000 on the property, and upon the basis of the \$25,000 valuation, defendant computed that the parties had an equity, after deducting the mortgage, interest and principal payments, amounting to \$8,247.35; and after subtracting what he contended was Mrs. Buehler's share of the interest, taxes and principal payments,

1938

COOPER, JAMES H.

vs.

v.

ALBERT C. COOPER

(Appellant)

MR. JUSTICE WILLIAM O. DOUGLAS

This is the second of three cases in which the

defendant Albert C. Cooper has been ordered to pay costs

entered in favor of the plaintiff, James H. Cooper.

20, 1937. The decree granted the plaintiff's motion for costs

of twenty-five dollars, and the defendant's motion for costs

whose costs were \$10.00, and the plaintiff's costs for his

solicitors and, among other things, to have his name removed

equal interests in the residence of 111 Madison Avenue, New York

City, Illinois, with the provision that the plaintiff should

as soon as convenient, the defendant in this case, James H.

was appointed executor to sell the property in the name of the

and the court set the date for the sale of the property

out the sale. The court also ordered the defendant to pay

agreement the plaintiff to sell the property to the plaintiff

was appointed and the plaintiff to sell the property to the

plaintiff was unable to sell the property to the plaintiff

plaintiff and the defendant to sell the property to the plaintiff

less certain to execute his duty in regard to the sale of

taxes and interest on the same. The court also ordered the

on the property, and the defendant to pay the costs of the

defendant to pay the costs of the plaintiff and the plaintiff

the mortgage, interest on the mortgage and the costs of

\$2,147.32; and after subtracting the costs of the mortgage

plaintiff's share of the interest, to pay the plaintiff \$1,000.00

he computed her equity in the residence at \$535.34, which he offered to pay her. She declined the offer, contending that his interpretation of the decree resulted in improperly charging her with payments which materially affected her equity in the property to the extent of several hundred dollars. Defendant thereupon filed a petition in the Superior court asking for a construction of the decree with respect to the liabilities of the parties to pay taxes, interest and other charges, pending the sale. To this petition plaintiff filed her answer. Upon hearing of the petition and answer, the court entered an order October 14, 1940, construing the decree, from which defendant appeals.

After awarding plaintiff and defendant an equal interest in the residence at Kenilworth, the original decree contained the following further provisions, which are the subject of controversy between the parties:

"It is further ordered, adjudged and decreed that all past due interest on encumbrances and general taxes, and all accrued general taxes and interest on encumbrances which have become due on such real estate hereinbefore described shall be charged against the share of the defendant and shall be paid by him, and he, the defendant, shall continue to pay such interest on the encumbrances and general taxes as they shall hereafter become due; such payments on principal which accrued from and after May 31, 1937, whether or not paid by the defendant, shall be charged one-half to the plaintiff and one-half to the defendant upon any proceeds received from the sale of the premises.

"It is further ordered, adjudged and decreed that all taxes which shall hereafter become due shall be paid one-half by the plaintiff and one-half by the defendant, the plaintiff's share to be charged against any money coming to her from the proceeds of the sale of these premises.

"It is further ordered, adjudged and decreed that all interest which shall hereafter become due on the encumbrances shall be charged one-half to the plaintiff and one-half to the defendant, the plaintiff's share to be charged against any proceeds she may receive from the sale of the equity."

Since the entry of the original decree October 20, 1937, plaintiff has occupied the residence at Kenilworth and defendant has, during that period, made payments on account of the principal

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indebtedness, taxes and interest on the mortgage. He sought by his petition to have the court find that under the foregoing provisions of the decree plaintiff should be charged one-half of the 1936 taxes, which amounted to \$440.28; one-half of the 1937 taxes, which amounted to \$433.56; one-half of the interest payment on the mortgage due June 24, 1937, which amounted to \$510; and one-half of another interest item of \$480, which was paid by defendant December 24, 1937, after entry of the decree, but which accrued before October 20, 1937.

However, the court found adversely to defendant's contention and interpreted the liability of the parties under the provisions of the decree as follows:

"(a) That the general real estate taxes for the year 1936 and prior years should be charged entirely against the defendant.

"(b) That the general real estate taxes for the year 1937, amounting to \$432.56 should be charged \$392.91 thereof against defendant, and \$36.95 thereof against plaintiff's share of the proceeds of the sale of said real estate, when sold.

"(c) That the general real estate taxes for the year 1938 and subsequent years should be divided equally between the parties and the portion charged against plaintiff be deducted from her share of the proceeds of the sale of said real estate, when sold.

"(d) That the interest on the mortgage encumbrance against said real estate for the six months' period beginning June 25, 1937, and ending December 24, 1937, which became due and payable December 24, 1937, amounting to \$480, should be charged \$394.58 against defendant and \$85.42 against plaintiff's share of the proceeds of the sale of said real estate, when sold;

"(e) That the interest on said mortgage encumbrance which became due and payable June 24, 1937, and theretofore be charged entirely against defendant;

"(f) That the interest on said mortgage encumbrance which became due and payable subsequent to December 24, 1937, should be divided equally between the parties and the portion charged against plaintiff deducted from her share of the proceeds of the sale of said real estate, when sold."

We think there can be no reasonable doubt that under the provisions of the decree the general real estate taxes for the year 1936 and prior years should be charged entirely against defendant, nor that the interest on the mortgage which became

intention, and the fact that his position was not...
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"(a) That the...
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"(e) That the...
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"(f) That the...
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"(g) That the...
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due and payable June 24, 1937, should also be charged to his account. Both of these items became due and were payable before October 20, 1937, when the decree was entered, and under the provision "that all past due interest on encumbrances and general taxes, and all accrued general taxes and interest on encumbrances which have become due on such real estate hereinbefore described shall be charged against the share of defendant," Mr. Buehler was clearly liable for the 1936 taxes and for all interest charges which became due prior to the entry of the decree.

Although when the petition was filed defendant sought to charge plaintiff with one-half of the taxes for the year 1936, he now apparently concedes his liability for the first installment of the 1936 taxes; but he argues that plaintiff should be held liable to pay one-half of the subsequent installments for 1936 and one-half of all the 1937 taxes. This contention is predicated upon various provisions of the Revenue Act of Illinois (pars. 165, 287, 331, 332 and 150 of ch. 120, Ill. Rev. Stat. 1935 (Smith-Hurd edition) and is the subject of an extended argument in defendant's brief predicated upon distinctions between the legal meaning of the terms "past due," "accrued," and "as they shall hereafter become due," as applied to both taxes and interest on the mortgage indebtedness. No doubt the disputed provisions of the decree are somewhat confusing because of the interchange of the terms "due," "accrued," and "to become due," but under the provisions of the Revenue Act at the time of the entry of the decree the county collector was required to proceed to collect the taxes upon receiving the tax books and the county clerk was required to deliver the books on or before December 31 of the year for which the taxes were assessed (pars. 143 and 331). This rendered the 1936 taxes due not later than January 1, 1937. When the decree was entered it purported to fix the rights of the parties as of October 20, 1937, the date of the entry

of the decree. Alimony, support of the children, solicitors' fees and other items were presumably to be computed and become due as of that date, and the court in awarding the parties equal interest in the family residence, with the provisions as to their respective liabilities for the payment of taxes and interest, pending the sale of the property, had no such refinements in mind as defendant now makes with respect to the meaning of words incorporated in the decree. It was manifestly the intention of the court that defendant should ~~not~~ pay all charges which were "due" or had "accrued" up to the time the decree was entered, and that a fair apportionment of the tax and interest liabilities should be made thereafter. This applied not only to 1937 taxes but to interest charges on the encumbrances as well. Defendant's counsel argue "that it is not the duty of a reviewing court to ascertain what a trial court meant, but rather to determine what was said;" nevertheless, they devote several pages of their brief to considerations they say the chancellor had in mind, as indicative of his intentions. We think the prorating of the taxes and interest charges subsequent to the entry of the decree was manifestly fair and in accordance with the language of the instrument, and that all charges that became due or accrued prior to the entry of the decree were expressly decreed to be the liability of defendant.

The order appealed from is accordingly affirmed.

ORDER AFFIRMED.

Scanlan, P. J., and Sullivan, J., concur.

SECRET

41709

GOLDIE BUEHLER,
Appellee,

v.

ALBERT C. BUEHLER,
Appellant.

APPEAL FROM SUPERIOR COURT,

COOK COUNTY.

31 J.A. 265²

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

This is the third appeal prosecuted by defendant, Albert C. Buehler, from orders arising out of a decree entered in favor of Goldie Buehler, plaintiff herein, on October 20, 1937. The second or preceding appeal (No. 41708) was taken from an order of the Superior court interpreting certain provisions of the decree with respect to the liability of the parties to pay taxes and interest on the family residence, a one-half interest to which had been awarded to each of the parties under the original decree. Defendant there sought to charge Mrs. Buehler with one-half of the tax and interest charges paid by him which became due or accrued before the decree was entered, and he filed a petition in the Superior court seeking a construction of the decree in conformity with his views. Plaintiff was obliged to employ counsel, answer the petition and participate in a hearing before the court resulting in an order adverse to defendant's claim, which is the subject matter of the appeal in cause No. 41708 (opinion filed concurrently with this case). Pending the hearing plaintiff presented a petition to the chancellor asking for an order on defendant to pay her as and for her attorneys' fees for the services necessarily required to defend the petition seeking a construction of the decree, and was awarded the sum of \$250. The amount of the fees allowed is not challenged, but defendant asserts that there is no statutory authority by which a court may require the husband to pay solicitors' fees to his wife for

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GOVERNMENT OF ALABAMA

v.

ALBION T. ALLEN

MR. JUSTICE, THE ALBION T. ALLEN

This is the case of the

Albion T. Allen, from whom

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October 20, 1917, from whom

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matters touching their property after a decree of divorce has been entered.

It may be conceded, of course, that courts have no powers to award solicitors' fees or to require a husband to pay his wife's solicitors' fees except where that authority is given by statute. There is authority in Illinois for awarding a divorced wife attorneys' fees necessarily incurred in defending against applications on the part of her husband for the reduction of alimony. In Stillman v. Stillman, 99 Ill. 196, the court had before it an order of the Circuit court discontinuing the wife's alimony upon her remarriage to another man, except the nominal amount of one dollar a year, but awarding the divorced wife attorneys' fees for services in resisting the application for the reduction of alimony. The Supreme court affirmed the order of the Circuit court with respect to the allowance of attorneys' fees in resisting the application, and so far as we have been able to ascertain this decision has been generally followed. Slezak v. Slezak, 293 Ill. App. 489; Thomas v. Thomas, 233 Ill. App. 488.

It is argued, however, that the construction of the decree for which the services were allowed had no application to the reduction of alimony. In this connection our attention is called to the order from which this appeal is taken, which recites that the matter was heard on evidence and the arguments of counsel, pursuant to which the court found: "1. That the defendant filed a petition on August 8, 1940, which petition could affect the plaintiff's award of alimony. 2. That the plaintiff employed an attorney to represent her in defense of her rights, which could have been affected by the said petition. 3. That the said attorney rendered valuable and necessary services." In invoking the court's jurisdiction to construe certain provisions of the decree in cause No. 41708, defendant, in his statement

1994

attached to the petition, asks credit against plaintiff for a broker's commission amounting to \$1,250, one-half of which was to be charged against plaintiff, one-half of the first installment of general taxes due August 1, 1937, amounting to \$110.07, and one-half of the interest payment on the mortgage due June 24, 1937, amounting to \$255. These items aggregated approximately \$1,000 for which defendant sought to render plaintiff liable. In the various pleadings filed in these three appeals, supported by competent evidence, plaintiff established the fact that she had no means or income other than that derived from the decree which awarded her \$175 a month as alimony, and that she was unable to retain and pay counsel for defending the numerous petitions for the ascertainment and enforcement of her rights under the decree; and manifestly she was obliged in this proceeding to defend the petition and relieve herself from the charge of some \$1,000 which defendant sought to impose upon her by reason of his interpretation of the decree. A reduction of her interest in the real estate to the extent of \$1,000 would have materially affected her award by the decree, whether it be designated as alimony or the settlement of property rights; it was something that the court gave her as part of the equitable relief which she obtained along with the divorce. The three appeals, in which opinions are herewith concurrently filed, were brought here by defendant from orders entered in the same case, and if Mrs. Buehler were required to defend these orders at her own expense out of the meager allowance made her, it is well conceivable that she might be rendered helpless to protect her interest under the decree. Under the authorities cited we are of opinion that she is entitled to be reimbursed for her reasonable solicitors' fees in defending these orders.

Moreover, the order of the court from which this appeal is prosecuted found that defendant filed a petition which "could

attached to the petition, which was filed in the
broker's commission account to the effect that the
to be charged against the estate of the decedent
ment of general taxes and interest, to the effect
and one-half of the interest payment on the mortgage was borne
24, 1937, amounting to \$1,000. These taxes and interest were
\$1,000 for which defendant sought to be reimbursed in the
the various pleadings filed in this cause again, and set off by
competent evidence, by which it was established that the estate had
no means or income other than that derived from the estate which
awarded her a sum of \$1,000, and that the estate was liable to
retain and pay counsel for defendant and the various pleadings for
the ascertainment and enforcement of her rights in the estate;
and manifestly she was entitled to this reimbursement from the
petition and relieve her of this burden. It is the duty of the
defendant sought to recover from the estate the sum of \$1,000
tion of the estate. It is the duty of the court to award to the
estate to the extent of the sum of \$1,000, and the estate is
her award by the court, and that the estate is liable to
the statement of the estate, and that the estate is liable to
court gave her the sum of \$1,000, and that the estate is liable to
along with the estate, and that the estate is liable to
her with the estate, and that the estate is liable to
orders entered by the court, and that the estate is liable to
to failing to comply with the orders of the court, and that the estate
since then, and that the estate is liable to
helpless to make any payment, and that the estate is liable to
authorities, and that the estate is liable to
reimbursement for the sum of \$1,000, and that the estate is liable to
these and be.

Moreover, the estate is liable to the court for the sum of \$1,000
is present - court that the estate is liable to the court for the sum of \$1,000.

affect the plaintiff's award of alimony," and that she employed counsel to represent her in defense of her rights "which could have been affected by the said petition." Since there is in this record no certificate of evidence or report of proceedings, the findings of the court must be taken as conclusive. David v. David, 359 Ill. 285; Renfrow v. Kramer, 341 Ill. 398. Plaintiff's petition for the allowance of fees, and upon which the order herein was entered, was filed while defendant's petition for interpretation of the decree in cause No. 41708 was pending, and plaintiff's answer in that proceeding likewise asked for the allowance of counsel fees.

We think the order of the Superior court was properly entered and it is therefore affirmed.

ORDER AFFIRMED.

Scanlan, F. J., and Sullivan, J., concur.

41847

BESSIE SIMON,
Appellant,

v.

PAULA BALASIC and
ALFRED BALASIC,
Appellees.

27 25
APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

313 I.A. 266¹

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

On October 29, 1940, plaintiff, Bessie Simon, procured a default judgment for \$424.60, which included a finding of malice, against the defendants, Alfred Balasic and Paula Balasic, for the alleged conversion by said defendants of certain personal property claimed to have been owned by plaintiff. The first knowledge that defendants had of the entry of the judgment was when execution issued pursuant thereto was served upon them January 7, 1941. On January 9, 1941, defendants filed their sworn petition in the nature of a writ of error coram nobis to vacate the judgment. On March 19, 1941, after denying plaintiff's motion to strike defendants' petition to vacate, the trial court entered an order vacating the default judgment of October 29, 1940, and setting the case for trial. It is from this order that plaintiff appeals.

Defendants filed an Amended Defense, which set forth a meritorious defense to plaintiff's complaint, and also a counterclaim. As heretofore shown the default judgment was entered against defendants October 29, 1940, and they were first apprised of its entry on January 7, 1941, when they were served with execution.

Defendants' sworn petition, filed January 9, 1941, to vacate the judgment was as follows:

"Now comes Sid Mogul and represents unto the Court as follows:

"1. That he is an attorney at law, duly licensed to practice in the State of Illinois and is associated with the firm of Max M. & Samuel Grossman, who are the attorneys of record for the defendants in this cause.

"2. That he is familiar with all of the facts pertaining to this matter and was active in representing the defendants herein.

"3. That from time to time he appeared on behalf of the defendants when the cause was called for trial and was at all times ready to proceed with the trial, but at all such times the plaintiff, by her attorney, requested a continuance.

"4. That on July 12, 1940, the matter came up for trial and was again continued to July 23, 1940.

"5. That again on July 23, 1940 the petitioner was informed by the Clerk of the Court in Room 902, City Hall, Chicago, Illinois, that July 12, 1940 was the last day of court before the commencement of the vacation schedule and that all matters on the call for July 12, 1940 would be continued and that since there was no court on July 23, 1940, any matters on the call for said date would be continued without date.

"6. The petitioner was further informed by the Clerk that if this cause were to come up again for trial it would be necessary for counsel to serve notice on the other to have it set down for trial on a day certain.

"7. That on January 7, 1941 at 3 P. M. this petitioner was informed that an ex parte judgment had been rendered against the defendants on October 29, 1940 for the sum of Four Hundred Twenty Four and 60/100 Dollars (\$424.60) and Seven (\$7.00) costs.

"8. That on January 7, 1941, very shortly after 3 P. M. was the first time that this Petitioner or either of the defendants had any notice or knowledge that the said judgment had been rendered against the defendants.

"9. That this cause was not properly on the trial call for October 29, 1940; that if same was placed thereon, it was done without notice to counsel for the defendants and such defendants and their counsel never had any notice or knowledge of the hearing held on October 29, 1940; that the file in this cause does not contain an order setting said cause for trial on October 29, 1940, nor does the file contain any notice or memorandum of such notice to the defendants, or their counsel, that said cause would be set down for hearing on October 29, 1940.

"10. That the defendants have a good and meritorious defense to all of the plaintiff's statement of claim, as will more fully appear from the Amended Defense previously filed herein, and as a matter of fact, said defendants have a counterclaim against the plaintiff, which is still pending and undisposed of.

"11. That said ex parte judgment was procured by fraud as evidenced by the fact that said plaintiff waited more than sixty (60) days to serve an execution upon the defendants, who are in business in Chicago and have been located at the same address for many years, all of which was well known to the plaintiff and her counsel, and said plaintiff did not at any time communicate with the petitioner or counsel for the defendants, nor notify the defendants in any manner that such a judgment had been rendered, nor did counsel for said plaintiff communicate with the petitioner, the attorneys for defendants, or the defendants themselves, that he would have the matter set down for hearing on October 29, 1940.

"Wherefore your petitioner prays that said ex parte judgment be vacated and set aside for fraud committed upon the court, the defendants, and their counsel, and that said cause be set down for hearing on the merits at an early date to be fixed by the court and that this court grant such other relief as it may deem just."

Plaintiff's motion to strike defendants' petition to vacate

was supported by the following affidavit of her attorney:

"Jacob Levy, being first duly sworn on oath deposes and says that he is the attorney for plaintiff in the above entitled cause.

"Affiant further states that when the said cause appeared on the trial call of July 12, 1940, the case was continued to July 23, 1940; that on said date, in Room 902, where cases of this nature and character are heard, the court had adjourned for the summer vacation.

"Affiant further states that shortly after the court had convened for the September term, affiant made inquiries of the Clerk in Room 902 and was advised that the cause in question had been set for October 29, 1940. Affiant further states that the said case appeared in the Daily Municipal Court Record of October 28, 1940, for October 29, 1940, a copy of which Municipal Court Record is hereto attached and marked Plaintiff's Exhibit 'B'.

"Affiant further states that he appeared with his client and witnesses in Room 902 on October 29, 1940, and that the cause was called for hearing before His Honor, Judge Green, in Room 902; that the evidence was taken in said cause and that Judge Green found for the plaintiff and entered judgment in favor of the plaintiff and against the defendant.*

Attached to and made a part of Attorney Levy's affidavit was a copy of the Municipal Court Record of October 28, 1940. The Municipal Court Record of said date showed various trial calls for the next day, October 29, 1940, including a call entitled "Room 902 City Hall - Judge Eugene McGarry, 9:30 A. M. Non-Jury Tort Cases." The instant case was on said call and Judge Green presided in that branch of the court on October 29, 1940, instead of Judge McGarry.

In another column of the Municipal Record of October 28, 1940, is found the following:

"ANNOUNCEMENTS

"In the matter of preparing an October, 1940 Special Civil Trial Calendar for the First District of the Municipal Court of Chicago.

"General Order No. 1147

"It Is Hereby Ordered, That the Clerk of the Municipal Court of Chicago be directed to prepare a Calendar of all pending First Class and ~~Fourth~~ Class Jury and Non-Jury, civil cases in the First District, which stand 'Continued Generally' or 'Without Date' or in which no service has been had prior to January 1, 1940, which said Calendar is to be known as the October, 1940 Special Civil Trial Calendar for the First District of the Municipal Court of Chicago.

"This Special Civil Trial Calendar will consist of:

"Contract - 'Continued Generally' and 'Without Date' cases

"Tort - 'Continued Generally' and 'Without Date' cases

"Attachment 'Continued Generally' and 'Without Date' cases

"Replevin - Same

"Detinue - Same

"Distress for Rent - No Service cases

"Contract - Same

"Tort - Same

"Replevin - Same

"Personal Property Tax Cases - Same

"It Is Further Ordered, ~~That~~ the call of this Calendar begin October 28, 1940, at 2:00 o'clock P. M. In Room 915 City Hall.

"It Is Further Ordered That this order be spread upon the records of this court.

"Dated at Chicago, Ill. this 15th day of October, A. D. 1940.
(Italics ours.)

"Enter: John J. Sonstebj,
"Chief Justice."

... of ...
... of Chicago ...

" ... "

"It is hereby ordered, that the ...
of this to be directed to ...
Class and Fourth Class ...
First District, which ...
Date, or in which no ...
1940, which ...
Special ...
Municipal Court of Chicago."

"This Special ...
Contract - ...
... - ...
... - ...

"... - ...
... - ...

"... for ... - ...
... - ...
... - ...
... - ...

"... - ...

"It is ...
October 11, 1940 ...
"It is ...
records of this ...

"Signed ...
(Initials only.)

...
...

It is undisputed that when this case appeared on the trial call on July 12, 1940, it was continued until July 23, 1940, and, the latter date falling within the vacation period, it was continued "without date." The photostatic copy of the "half sheet" in this cause shows no order or memorandum of an order thereon continuing the case for trial to October 29, 1940, or setting it for trial on that date.

Were defendants or their attorneys negligent in failing to discover that this case was included in the trial call for October 29, 1940, in Room 902 City Hall, as announced in the Municipal Court Record of October 28, 1940? We think not. While under the rules of the Municipal court attorneys and litigants are bound to take notice of announcements and calls made in the Municipal Court Record concerning their cases pending in said court, in our opinion defendants and their attorneys were not bound to search for this case on the call of cases set for trial on October 29, 1940, in Room 902 City Hall, in view of the fact that the Municipal Court Record of October 28, 1940, and all issues of said publication, commencing with that of October 15, 1940, carried the announcement of the order entered by the Chief Justice of the Municipal court, heretofore set forth, that the Clerk of said court "prepare a calendar of all pending First Class and Fourth Class Jury and Non-Jury civil cases *** which stand 'Continued Generally' or 'Without Date' *** which said Calendar is to be known as the October, 1940 Special Civil Trial Calendar." This order as announced further specified, "This Special Civil Trial Calendar will consist of" (several classes of cases), including "Tort - 'Continued Generally' and 'Without Date' cases" and "the calls of this Calendar begin October 28, 1940, at 2:00 o'clock P. M. In Room 915 City Hall."

Since this is a tort case and since it was continued "without

It is understood that the...
call on July 12, 1940, it was...
the latter date...
timed...
in this sense shows no...
continuing the case for trial...
for trial on that date.

Were defendants or their...
discover that this case...
October 29, 1940, it was...
Municipal Court record of October 28, 1940...
While under the rules of the...
gants are bound to...
the Municipal Court record...
court, in an opinion...
to search for this case...
October 29, 1940, in...
the Municipal Court...
said publication...
the announcement...
Municipal Court...
"prepare a...
and non-jury...
"Without date...
1940...
specified...
(several...
and...
October 29, 1940...
Since this is a...

date," it clearly came within the classification of cases covered by the foregoing order, the call of which cases was to begin at 2 P. M. on October 28, 1940, in Room 915 City Hall. This being the call on which this case properly belonged, there was no necessity or obligation on the part of defendants or their attorneys to examine every other court call in the Municipal Court Record of October 28, 1940, including the trial call for October 29, 1940, in Room 902 City Hall, to ascertain the possibility of its appearing on some other call. This is true even though it does not appear that defendants or their attorneys had notice or knowledge of the announcement of the aforesaid order of the Chief Justice of the Municipal court.

Inasmuch as this case belonged on the call that was to commence at 2 P. M. on October 28, 1940, in Room 915 City Hall, and on no other call, it is obvious that its appearance on the trial call for Room 902 City Hall on October 29, 1940, could only have occurred by reason of mistake or inadvertence on the part of the clerk of the court. There was only one possible way that the case could have properly been on the trial call for Room 902 City Hall on October 29, 1940, and that was that it was reached and called on the Room 915 City Hall call on the afternoon of October 28, 1940, and assigned for trial on October 29, 1940, in Room 902 City Hall. But it was not so called and assigned and it is not claimed by plaintiff that it was.

The only explanation offered by plaintiff for the appearance of this case on the Room 902 City Hall call for October 29, 1940, is that of attorney Levy that sometime in September, 1940, the clerk in Room 902 City Hall informed him that the case was set for trial on October 29, 1940, in that courtroom. This purported statement of the clerk, which is entirely inconsistent and at variance with the aforementioned order of the Chief Justice of the

date," it is fairly well established that the...
by the...
...
the call on which this...
necessity or obligation on the part of...
attorneys to examine every...
Court beyond of...
October 29, 1940, in Room 902 City...
bility of its...
though it does not appear that...
notice or knowledge of the...
the Chief Justice of the...
Inasmuch as this case...
at 2 P.M., on October 29, 1940, in Room 902 City...
other call, it is evident that...
Room 902 City...
reason of mistake or...
court. There was only one...
properly been on the...
29, 1940, and that...
912 City will call on...
assigned for...
that it was not...
plaintiff that...

The only...
of this case...
is that of...
of the...
for trial...
statement of...
version...

Municipal court, must be entirely disregarded.

The appearance of this case on the trial call for Room 902 City Hall on October 29, 1940, was clearly due to the misprision of the Clerk of the court in that he had no authority to place it on said call and it has been repeatedly held that misprision of a clerk of a court under circumstances such as appear here furnishes sufficient ground for the allowance of a motion in the nature of a writ of error coram nobis to vacate a judgment at a term subsequent to its entry. (Brady v. Washington Insurance Co., 82 Ill. App. 380; Rosenthal v. Wald, 252 Ill. App. 383.) The misprision of the clerk here shown was such an error of fact, which, if known to the court, would have precluded the entry of the judgment herein. It is certain that if Judge Green, who entered the judgment, had known that this case was improperly and without authority on his trial call on October 29, 1940, he would not have entered said judgment.

Plaintiff contends that the motion to vacate the judgment should have been presented to Judge Green, who entered same. It is true that the motion to vacate should have been presented to Judge Green, but since it was not and was presented to Judge Hermes, the then acting Chief Justice of the Municipal court, and plaintiff's attorney participated in all of the proceedings before Judge Hermes without objection, plaintiff will not be permitted to object to such proceedings for the first time in this court.

Other points have been urged and considered but in the view we take of this cause we deem further discussion unnecessary.

For the reasons stated herein the order of the Municipal court is affirmed.

ORDER AFFIRMED.

Scanlan, P. J., and Friend, J., concur.

41958

LOUISE M. ZIEBELL,
Appellee,

v.

TOWN OF BREMEN, a corporation,
Appellant.

28 6
APPEAL FROM CIRCUIT COURT,

COOK COUNTY.

3131A.266²

MR. JUSTICE SULLIVAN DELIVERED THE OPINION OF THE COURT.

This is an action at law brought by plaintiff, Louise M. Ziebell, against defendant, Town of Bremen, a quasi municipal corporation, to recover upon a tax anticipation warrant and a township note. Defendant's motion to dismiss plaintiff's amended complaint was overruled and, defendant electing to abide by its motion to dismiss, judgment was entered against it for \$1,453. This appeal seeks to reverse the judgment.

Plaintiff's amended complaint consists of two counts, the first of which alleged substantially that December 29, 1938, the township sold and the plaintiff purchased a tax anticipation warrant issued by said township for \$500; and that said warrant contains the following provisions:

"Principal hereof and interest hereon will be paid in lawful money of the United States of America from the proceeds of taxes, when received, heretofore levied upon all the taxable property in said township for the year 1937 for the relief and support of poor and indigent persons lawfully resident within said Township.

"This warrant is issued in anticipation of taxes so levied for the year 1937 to provide a fund to meet and defray the necessary expenses of said Township for the relief and support of poor and indigent persons lawfully resident within said Township, and is payable, both principal and interest, in the numerical order of its issuance, solely from said taxes when

TO THE HONORABLE MEMBERS OF THE HOUSE OF REPRESENTATIVES
OF THE STATE OF NEW YORK

MEMORANDUM FOR THE RECORD

Stiebel, against defendant, and of which it was determined
to recover if in fact said Stiebel was a corporation.

township of 36,000 acres, 10,000 of which are in the
township of 36,000 acres, 10,000 of which are in the

collected, which taxes are hereby assigned and pledged to the payment of this warrant and all warrants issued against and in anticipation of such taxes, the total of which warrants so issued does not exceed seventy-five per cent *** of the tax levy made therefor and shall be received by any collector of taxes in payment of the taxes against which it is issued."

The complaint further alleged that "the tax levied by said Township for the year 1937 for the relief and support of poor and indigent persons lawfully resident within said Township was Fifteen Thousand Dollars; *** the total of all tax warrants issued against said levy did not exceed Thirty-five Hundred Dollars ***; the total of taxes collected on said levy was over Eight Thousand Dollars ***;" that "all of the taxes collected under said levy were by the Board of Auditors of said Township used in paying legitimate and legal claims against said Township and that none of said Tax Warrants were paid nor was any notice published or otherwise given to the holders of said Warrants (plaintiff being one of said holders as was then well known to the officials of said Township) that money was available for the payment of said warrants or any of them;" and that there is due plaintiff from defendant upon said Warrant the sum of \$500.

The second count of the complaint alleged that on August 5, 1940, the Board of Auditors of the Township of Bremen adopted the following resolution:

"Whereas it appears that the Supervisor of the Town of Bremen has used the amount of Eight Hundred Sixty Dollars *** collected for and belonging to the bond fund, and in consequence thereof the Town can not pay the interest now due on said bonds.

"Therefore be it and it is hereby resolved by the Board of Town Auditors in special meeting assembled that the Supervisor and Clerk of this town be and they are hereby authorized to borrow the sum of Eight Hundred Sixty Dollars *** to be used in paying said interest and they are further hereby authorized to repay said loan with 5% interest from the second installment of the 1939 taxes."

collected, which taxes were properly levied and collected, and payment of this return should have been made in full and in anticipation of such taxes, the total of taxes levied and collected does not exceed seventy-five per cent of the total taxes made therefor and shall be received by the collector of taxes in payment of the taxes against which it is levied.

The complaint further alleged that the tax levied by said Township for the year 1937 for the relief and support of poor and indigent persons lawfully residing within said Township was Fifteen thousand Dollars; ** the total of all the taxes levied against said levy did not exceed Twenty-five thousand Dollars; the total of taxes collected on said levy was over Eight thousand Dollars; ** that "all of the taxes collected under said levy were by the Board of Aldermen of said Township used in paying legitimate and lawful claims against said Township and that none of said Township's taxes were paid nor any notice published or otherwise given to the holders of said warrants (plaintiff) till being one of said holders as was then well known to the officials of said Township) that money was levied for the payment of said warrants on any of Township and that the plaintiff from defendant upon said warrants the sum of \$100.

The second count of the complaint alleged that on or about 1940, the Board of Aldermen of the Township of Green levied the

following resolution:

"Whereas it appears that the supervisor of the town of Green has used the amount of \$100 in illegal ways and collected for and disbursed to the town of Green, and in consequence thereof the town can not pay the interest on the said bonds

"Therefore be it resolved that it is hereby resolved by the Board of Town Aldermen in special session that the supervisor and clerk of this town be and they are hereby authorized to recover the sum of \$100 from the said supervisor *** to be used in paying said interest on the said bonds hereby authorized to pay said interest on the said bonds from the said installment of the said bonds."

It was further alleged that in compliance with said resolution the supervisor and clerk of said township borrowed \$860 from plaintiff and executed and delivered to her a note in that amount; that the money so borrowed from plaintiff by the township was used by it in paying the interest on the bonds mentioned in the foregoing resolution; that no part of said note has been paid; and that there is still due plaintiff on same \$860 plus interest.

The complaint concluded with a prayer that judgment be entered in favor of plaintiff and against defendant for \$1,434.70 plus interest on the obligations set forth in counts one and two of said complaint.

Defendant's written motion to dismiss plaintiff's complaint averred inter alia that "said amended complaint in Count 1 fails to state a cause of action against this defendant, the Town of Bremen, a quasi-municipal corporation;" and that "the defendant, the Town of Bremen, could not legally issue a note in the nature of that sued upon in Count 11 of the amended complaint upon which it could incur any liability or indebtedness, either actually or contingent."

Defendant contends (1) that "a municipality is not indebted as a result of issuing tax anticipation warrants and (2) that a municipality does not have the power to borrow money and issue commercial paper and, therefore, plaintiff's amended complaint failed to state any causes of action."

Plaintiff's theory is that in equity and good conscience the defendant township should not be permitted to retain moneys which she paid or lent to it and that she is entitled to recover same.

It is admitted that defendant received \$500 from plaintiff in payment of a tax anticipation warrant as charged in the first count of the complaint and that the township received \$860 from

It was further alleged that the plaintiff had been
the supervisor and one of the principal officers of the
plaintiff and executed and delivered to her a note for the amount

that the money so borrowed from plaintiff by the defendant was
used by it in paying the interest on the bonds mentioned in the
foregoing recitation; that no part of a note had been paid;

and that there is still due plaintiff on said \$600 plus interest.
The complaint contained which alleged that the defendant

entered in favor of plaintiff and against defendant for \$1,434.70
plus interest on the obligation set forth in counts one and two
of said complaint.

Defendant's written motion to dismiss plaintiff's complaint
averred inter alia that "said executed complaint in Count 1 fails

to state a cause of action against this defendant, the town of
Bremen, a quasi-municipal corporation;" and that "the nature
the town of Bremen, could not legally issue a note in the nature
of that set forth in Count 1 of the above complaint upon which
it could recover any liability or indebtedness, either actually or
contingent."

Defendant contends (1) that "a municipality is not and does
not have the power to issue a note or any other security
commercial paper and, therefore, the complaint is
fatal to the cause of action."

Plaintiff's theory is that in such a case the complaint
in defendant's complaint should not be permitted to remain
which she held on loan to it and that she is entitled to recover
same.

It is admitted that the defendant received from plaintiff
in payment of a tax liability a certain amount of money in the first
count of the complaint and that the defendant is now in possession

her by way of a loan as charged in the second count of the complaint.

In so far as the first count of the complaint is concerned it has been repeatedly held that tax anticipation warrants do not impose any obligation upon the taxing body to pay same to the purchasers or holders thereof. (Dimond v. Commissioner of Highways, 366 Ill. 503; Leviton v. Board of Education, 374 Ill. 594; Berman v. Board of Education, 360 Ill. 535; City of Springfield v. Edwards, 84 Ill. 626; Law v. People, 87 Ill. 385; Fuller v. Heath, 89 Ill. 296; Schulenburg & Boeckler Lumber Co. v. E. St. Louis, 63 Ill. App. 214; Booth v. Opel, 244 Ill. 317; People v. Nelson, 344 Ill. 46; People v. Hamilton, 366 Ill. 455; People v. Hayes, 365 Ill. 318; People v. Huron & Orleans Corp., 368 Ill. 469; People v. Wabash Ry. Co., 368 Ill. 498; People v. Axelrod, 373 Ill. 446; People v. M. Born & Co., 373 Ill. 490.)

In Leviton v. Board of Education, supra, the court said at p. 598:

"A tax anticipation warrant is simply an assignment of tax money which directs the treasurer to pay the holder. In the alternative, it can be presented to the tax collector in full discharge of taxes. We have repeatedly held no debt is created by an anticipation warrant, and after delivery there is no future obligation upon it, either absolute or contingent, to pay out of anything except the levy anticipated, when collected."

In Dimond v. Commissioner of Highways, supra, the court stated at p. 506:

"When the warrant is issued and accepted or sold, the transaction is closed on the part of the municipality, leaving no future obligation upon it, either absolute or contingent, whereby its debt may be increased. The holder of such warrant must look to the specific fund set apart for its payment. We pointed out that, under section 9 of article 9 of the constitution, all taxation by municipal corporations must be for corporate purposes, and that bonds purporting to be a general obligation of the municipality and issued in payment of anticipation warrants, are not for a corporate purpose and are therefore invalid. It follows that a judgment on such a warrant, the payment of which could be exacted from general funds, falls within the same category."

In Berman v. Board of Education, supra, the court held at pp. 539, 540:

"Such warrants do not constitute, and cannot be construed as constituting, any promise of payment, either express or implied, on the part of the taxing body issuing them, but the holder thereof 'must rely solely upon the ability and fidelity of the revenue officers in the collection and payment of the money mentioned in the warrants.' *** The legal effect of the transaction is that the person receiving such warrant discharges the corporation from all liability on account of the service or obligation for which it was drawn. *** The transaction is similar to that of a bank selling a note 'without recourse.' The holders of tax anticipation warrants must look to the specific fund set apart for the payment of their warrants, as the cases above cited are authority that tax anticipation warrants are not contracts and the municipality is not indebted as a result of their issuance."

In City of Springfield v. Edwards, supra, after stating that a municipality already indebted beyond the constitutional limitation cannot lawfully incur any new debt or liability but that a city so situated may, to defray current expenses, anticipate the collection of taxes already levied, provided that the mode of appropriating or setting apart for that purpose a part of the taxes be such as to impose no liability upon the city, the court enunciated the rule applicable to tax anticipation warrants at pp. 633, 634:

"When the appropriation is made and the warrant or order on the treasury for its payment is issued and accepted, the transaction is closed on the part of the corporation - leaving no future obligation, either absolute or contingent, upon it, whereby its debt may be increased. *** If the making of the appropriation and issuing and accepting a warrant for its payment does not have the effect of relieving the corporation of all liability, or, in other words, if it incurs any liability thereby, it must manifestly incur, either absolutely or contingently, a debt."

"Where a warrant or order, payable from a specific appropriation of a tax levied but not yet collected, is accepted in exchange for services rendered or to be rendered, or for materials furnished or to be furnished, so that there is, in fact, but the exchange of one thing for another, the duty remains for the proper officers to collect and pay over the tax in accordance with the appropriation - but, obviously, for any failure in that regard, the remedy must be against the officers and not against the corporation, for, otherwise, a contingent debt would, in this way, be incurred by the corporation."

It clearly appears from the foregoing authorities that

THE HISTORY OF THE UNITED STATES

1776-1789

The first of the great principles of the American Revolution was the right of the people to alter or to abolish their government. This principle was the basis of the Declaration of Independence, which declared that the colonies were no longer bound to the British Crown. The second principle was the right of the people to a government of their own making. This principle was the basis of the Constitution, which established a government of the people, by the people, and for the people. The third principle was the right of the people to a government that would protect their rights. This principle was the basis of the Bill of Rights, which guaranteed the rights of the people against the government.

The fourth principle was the right of the people to a government that would promote the general welfare. This principle was the basis of the Federalist Papers, which argued for the adoption of the Constitution. The fifth principle was the right of the people to a government that would be accountable to them. This principle was the basis of the system of checks and balances, which was designed to prevent any one branch of the government from becoming too powerful. The sixth principle was the right of the people to a government that would be free from corruption. This principle was the basis of the system of public office, which was designed to ensure that public officials were accountable to the people.

The seventh principle was the right of the people to a government that would be free from tyranny. This principle was the basis of the system of federalism, which was designed to prevent the federal government from becoming too powerful. The eighth principle was the right of the people to a government that would be free from oppression. This principle was the basis of the system of civil liberties, which was designed to protect the rights of the people against the government. The ninth principle was the right of the people to a government that would be free from discrimination. This principle was the basis of the system of equal rights, which was designed to ensure that all people were treated equally under the law.

The tenth principle was the right of the people to a government that would be free from waste. This principle was the basis of the system of public finance, which was designed to ensure that the government was able to pay its debts and to provide for the needs of the people. The eleventh principle was the right of the people to a government that would be free from inefficiency. This principle was the basis of the system of public administration, which was designed to ensure that the government was able to carry out its duties in a timely and efficient manner. The twelfth principle was the right of the people to a government that would be free from dishonesty. This principle was the basis of the system of public ethics, which was designed to ensure that public officials were honest and trustworthy.

tax anticipation warrants are not debts and do not represent direct legal obligations of the municipality issuing them. Therefore the Township of Bremen did not become indebted to plaintiff by reason of its issuance and sale to her of the tax anticipation warrant in question. Because of the failure of the proper officers of Bremen to pay plaintiff's tax anticipation warrant, her remedy, if any, is against such officers and their sureties rather than the Township of Bremen.

As to the second count of the complaint, defendant contends that it had no power to borrow the money from and to issue the note to plaintiff and that, therefore, it is not liable for the payment of same. Thus the question presented under this count is whether the defendant township could legally issue a note of the nature of that delivered to plaintiff, upon which it could incur any liability or indebtedness.

Municipalities can only exercise such powers as are conferred upon them by their charters. (Merchants Trust Company v. Chicago, 264 Ill. 76; Stripe v. City of Waukegan, 254 Ill. App. 74.) The power to borrow money and create indebtedness is not an incident of local municipal governments. (Law v. People, 87 Ill. 385; Coquard v. Village of Oquawka, 192 Ill. 355; Merchants Trust Company v. Chicago, *supra*; Hewitt v. Normal School District, 94 Ill. 528; Randolph v. Town of Bernadotte, 243 Ill. App. 581.)

In Law v. People, *supra*, the court said at p. 394:

"The law is, and all persons are presumed to know it, that municipal bodies can only exercise such powers as are conferred upon them by their charters, and all persons dealing with them must see that the body has power to perform the proposed act. Such corporations are created for governmental and not for commercial purposes. Hence power to borrow money or create indebtedness is not an incident to such local governments, and the power cannot be exercised unless it is conferred by their charter, and no one has the right to presume the existence of such a power, and persons proposing to loan money to these bodies must see that the power exists."

In Hewitt v. Normal School District, *supra*, the court used

the following language at p. 531:

"Municipal corporations are not usually endowed with power to enter into traffic or general business, and are only created as auxiliaries to the government in carrying into effect some special governmental policy, or to aid in preserving the order and in promoting the well being of the locality over which their authority extends. Where a corporation is created for business purposes, all persons may presume such bodies, when issuing their paper, are acting within the scope of their power. Not so with municipalities. Being created for governmental purposes, the borrowing of money, the purchase of property on time, and the giving of commercial paper, are not inherent, or even powers usually conferred; and unless endowed with such power in their charters, they have no authority to make and place on the market such paper, and persons dealing in it must see that the power exists. This has long been the rule of this court. Board of Supervisors v. Farwell, 25 Ill. 181; Clark v. Hancock County, 27 Ill. 305; Marshall County v. Cook, 38 Ill. 44; Wiley v. Silliman, 62 Ill. 170; Harding v. Rockford, R. I. & St. L. R. R. Co., 65 Ill. 90; McWhorter v. People, 65 Ill. 290; Town of Big Cove Grove v. Wells, 65 Ill. 263."

There is no statute of this state which conferred upon the defendant township the power and authority to make a loan from plaintiff under the circumstances shown here or to give her a valid note evidencing same.

While we regret plaintiff's unfortunate predicament, we are impelled to hold that under the established law of this state she is not entitled to recover under either count of her amended complaint.

The judgment of the Circuit court is reversed and judgment is entered here in favor of defendant and against plaintiff.

JUDGMENT REVERSED AND JUDGMENT HERE
IN FAVOR OF DEFENDANT AND AGAINST
PLAINTIFF.

Scanlan, P. J., and Friend, J., concurs.

42148

BERTHA HESS, SEGEL HESS, LAURA RINGER,
LOTTA RINGER, PHILIP E. RINGER and
SOPHIA G. LEDERER,

Appellees,

v.

AQUITANIA APARTMENTS COMPANY, a cor-
poration, BURTON SMITH, M. EDWARD SMITH,
HOWARD D. MOSES, GEORGE GAIN, AARON
COLNON, STUART COLNON, JOHN E. COLNON &
CO., INC., a corporation, and FORT DEAR-
BORN MORTGAGE COMPANY, a corporation,
Appellants.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

29
131A.267

MR. JUSTICE MATCHETT DELIVERED THE OPINION OF THE COURT.

The defendants have appealed from an order entered November 24, 1941, granting the motion of plaintiffs for an interlocutory injunction restraining them pending the suit from executing a mortgage on all the property of the corporation for the sum of \$165,000. The bill was filed October 25, 1941. Plaintiffs show that they are the holders of 100 shares of the common stock of the Aquitania Apartments Company, an Illinois corporation. They sue for themselves and other stockholders. As of April 30, 1940, and at present the total stock of the corporation consists of 9,750 common shares. The principal asset of the corporation is an apartment building of 82 apartments situated at 5000 North Marine Drive in Chicago. The present directors are defendants, M. Edward Smith (who is also president), Burton Smith (who is also secretary) and attorney Howard D. Moses. In 1938, 2,230 shares of the stock were purchased from owners at about 50% of its book value, and a substantial part of these shares were transferred on the books into the names of the two Smiths and defendant Aaron Colnon. The two Smiths and Aaron Colnon are alleged to also be officers or employees of the Fort Dearborn Mortgage Company, from whom it is proposed to negotiate the mortgage. The purchasers, it is alleged, did not purchase

in their own behalf but as nominees of defendants Aaron Colnon, Stuart Colnon, John E. Colnon & Co., Inc., or a syndicate or corporation with which the Colnons were associated.

The bill charges that the purchasers of this stock formulated a plan to secure control of the Aquitania corporation by acquiring enough stock to enable them to elect all the directors and officers of the company. To that end they have acquired 1,233 more shares of stock so that at the time of the filing of the bill they held 3,463 shares out of the total 9,750 shares which constituted the capital stock of the Aquitania corporation.

Since the original acquisition of the shares by defendants the net income of the Aquitania corporation has been about \$50,000 after payment of expenses. The complaint says for the purpose of depressing the price of the stock of the corporation (more of which they wish to acquire) defendants have expended an amount in excess of the income of the corporation for rehabilitation; that a substantial amount of this rehabilitation was not required and could have been deferred. There is an existing mortgage on which there is a balance unpaid of \$110,750, payable semi-annually at the rate of \$7,000 per year, with a final maturity of \$78,250 on October 20, 1947. The earned surplus of the corporation on April 30, 1941, was \$16,444.69. On September 17, 1941, the directors suggested the proposal to negotiate a new first mortgage loan of \$165,000. September 22, notice of a special meeting of the stockholders was sent out, at which approval of the plan would be requested. A copy of this notice is attached to the complaint. Pending the suit, the court permitted the meeting of the stockholders to be held, and more than two-thirds of the shares were voted in favor of the loan. It is proposed the new mortgage shall be issued through the Fort Dearborn Mortgage Company, or some principal for whom it is agent or broker. The two Smiths are associated with both the Aquitania

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and the Fort Dearborn corporations and stand in a fiduciary relationship to each of them.

Prior to April 1, 1940, the combined salaries of officers of the Aquitania corporation did not exceed \$1,000 per year. On that date these defendant directors increased the salaries of these officers to \$3,000 per year, and it is averred the salaries are in excess of a reasonable value of any services rendered. The complaint also charges that benefit from this increase in salaries inured to the principals of the Smiths and Cain, by which they profit. At the same time the defendant directors voted to retain Mr. Moses as attorney for \$600 per year. The bill charges this is excessive.

In 1937, John E. Colnon & Co., Inc. was employed to rent and manage the building, receiving a compensation of 3-1/2% of the gross rentals. After the purchase of this stock this compensation was increased to 4%, which the bill says is more than other reliable firms charge for such services. In addition an employee of John E. Colnon & Co. is given his rent free in the building. The bill says that John E. Colnon & Co. has made excessive expenditures and received commissions to which it is not entitled; that it has not performed its services for the benefit of the Aquitania Apartments Company but has caused funds to be improperly expended or made excessive expenditures or earned commissions to which it was not lawfully entitled.

In their letter to the stockholders, dated September 1941, (which appears as Exhibit A of the bill and is signed president of the corporation) it is stated that the directors are aware that the stockholders have been disappointed in not receiving dividends since the organization of the company in 1936; payment of dividends does not seem probable for some time

1. The first of these is the fact that the United States is a member of the North Atlantic Treaty Organization (NATO) and is therefore bound by the obligations of that organization. The second is the fact that the United States is a member of the Organization for Economic Cooperation and Development (OECD) and is therefore bound by the obligations of that organization. The third is the fact that the United States is a member of the World Trade Organization (WTO) and is therefore bound by the obligations of that organization. The fourth is the fact that the United States is a member of the International Monetary Fund (IMF) and is therefore bound by the obligations of that organization. The fifth is the fact that the United States is a member of the World Bank and is therefore bound by the obligations of that organization. The sixth is the fact that the United States is a member of the United Nations and is therefore bound by the obligations of that organization. The seventh is the fact that the United States is a member of the Organization of American States (OAS) and is therefore bound by the obligations of that organization. The eighth is the fact that the United States is a member of the Organization of the Americas for Economic Cooperation (OEA) and is therefore bound by the obligations of that organization. The ninth is the fact that the United States is a member of the Organization of the Caribbean Sea (OCS) and is therefore bound by the obligations of that organization. The tenth is the fact that the United States is a member of the Organization of the Eastern Caribbean States (OECOS) and is therefore bound by the obligations of that organization. The eleventh is the fact that the United States is a member of the Organization of the Latin American and Caribbean States (OLAS) and is therefore bound by the obligations of that organization. The twelfth is the fact that the United States is a member of the Organization of the Pacific Rim (OPR) and is therefore bound by the obligations of that organization. The thirteenth is the fact that the United States is a member of the Organization of the Pacific Rim (OPR) and is therefore bound by the obligations of that organization. The fourteenth is the fact that the United States is a member of the Organization of the Pacific Rim (OPR) and is therefore bound by the obligations of that organization. The fifteenth is the fact that the United States is a member of the Organization of the Pacific Rim (OPR) and is therefore bound by the obligations of that organization. The sixteenth is the fact that the United States is a member of the Organization of the Pacific Rim (OPR) and is therefore bound by the obligations of that organization. The seventeenth is the fact that the United States is a member of the Organization of the Pacific Rim (OPR) and is therefore bound by the obligations of that organization. The eighteenth is the fact that the United States is a member of the Organization of the Pacific Rim (OPR) and is therefore bound by the obligations of that organization. The nineteenth is the fact that the United States is a member of the Organization of the Pacific Rim (OPR) and is therefore bound by the obligations of that organization. The twentieth is the fact that the United States is a member of the Organization of the Pacific Rim (OPR) and is therefore bound by the obligations of that organization.

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the directors have decided that stockholders who so wish should have a chance to dispose of their stock, and that upon completion of this refinancing arrangement an offer to retire a limited number of shares would be sent to all the stockholders. The letter states that the proceeds would be used to retire the present loan of \$114,250, to rehabilitate the lobby at a cost of \$15,000, to add \$20,000 to current working capital and to retire and cancel shares of the capital stock of the company in accordance with an offer to be made at a subsequent date.

Some of defendants filed an answer to plaintiffs motion for an injunction, some made a motion to strike or deny plaintiffs motion. They also filed separate motions to dismiss the suit because the complaint did not state a cause of action. The Court afterwards on November 24, 1941, entered the order from which this appeal is taken.

Defendants contend that the issuance of an injunction under the facts stated in the bill of complaint is an unwarranted interference by the court with the internal management of a corporation, and they cite a large number of well known cases, as McQuillen v. National Cash Register Co., 27 Fed. Supp. 639, 647, where it is said it is not the function of a court to substitute its judgment for that of persons lawfully in control of a corporation. People ex rel. Barrett v. Shurtleff, 353 Ill. 248, 262; Coquard v. Nat'l. Linseed Oil Co., 171 Ill. 480, 486; and Wright v. Heublein, 238 Fed. 321. There is no doubt about this general rule. However, the rule is not intended to place a minority at the mercy of a majority who deal unfairly with them. On the contrary, the officers and directors of a corporation are for all the stockholders and have no right to act either oppressively, and the powers of a court of equity will be used to prevent such acts on the part of those who may be

control of the internal management of a corporation.

The complaint is duly verified and the motion to strike admits well pleaded facts averred in the complaint to be true. It is said that the bill does not use the word "fraud" in connection with its charges. The use of that word, however, would be a mere epithet. The question is whether the facts stated would, as a matter of law, if true, amount to a fraud. The bill does charge a plan and purpose on the part of these defendants to secure for themselves benefits to which they are not entitled. It charges an attempt to manipulate the price of the stock of the corporation in such a way as to enable the defendants to secure it for much less than it is worth, and to that end it charges a refusal to pay dividends, the use of the funds of the corporation for unnecessary expenses, and it alleges that the plan to make this loan is a device of these persons to the same end. There is no denial of the allegation that the salary of officers has been tripled and that there is no benefit to the corporation from the increased salaries. The facts stated, if true, are such that any right thinking person would say that the conduct described ought not to be approved. The facts averred show that the plan to borrow money on the assets of the corporation to retire a part of the capital stock would have the effect of giving to these particular defendants the entire control of the corporation. The purchase by a corporation of its shares of stock has not been considered by the courts of this state as necessarily improper, but courts everywhere have recognized that such purchase may be made in such a way as to bring unconscionable results. The subject is considered in the case of Brown v. Fire Insurance Co. of Chicago, 265 Ill. App. 393, cited in the briefs. We there stated that the courts of this state "are committed generally to the rule that a corporation may, in the absence of charter

2-3-42
proper

or statutory restrictions, purchase its own stock, provided it acts in good faith and is neither insolvent or in process of dissolution, and provided such purchase is not prejudicial to the rights of its creditors or stockholders". We also there called attention to the fact that in England and in many of the states such action is illegal under all circumstances and not permitted. This subject is now controlled in this state by statute. Section 157.6 of the General Corporation Act, Chapter 32 of the Ill. Rev. Stat. 1941, provides:

"A corporation shall have power to purchase, take, receive, or otherwise acquire, hold, own, pledge, transfer, or otherwise dispose of its own shares, provided that it shall not purchase, either directly or indirectly, its own shares when its net assets are less than the sum of its stated capital, its paid-in-surplus, any surplus arising from unrealized appreciation in value or revaluation of its assets and any surplus arising from surrender to the corporation of any of its shares, or when by so doing its net assets would be reduced below such sum."

In the Illinois Business Corporation Act Annotated, § 6, page 39, the language of the statute is explained as follows:

"The general rule established in this section is equivalent in most cases to the rule that purchases of a corporation's own shares may be made only 'out of' earned surplus. Because of the difficulty in forming an adequate definition of 'earned surplus' the rule was stated indirectly forbidding purchases 'out of' stated capital and various types of surplus other than earned surplus."

In this case the complaint states that the earned surplus is \$16,444.69. It also appears that if the proposed mortgage is executed the amount available for the purchase of shares of the corporation will be \$19,750, which is more than \$3,000 in excess of the surplus. It therefore appears from the statement made by the defendants themselves and attached to the bill of complaint that the proposed purchase of stock would violate this provision

1. The first step in the process of the investigation is the identification of the problem. This is done by the investigator who is responsible for the study. The next step is the collection of data. This is done by the investigator who is responsible for the study. The next step is the analysis of the data. This is done by the investigator who is responsible for the study. The next step is the interpretation of the results. This is done by the investigator who is responsible for the study. The next step is the presentation of the results. This is done by the investigator who is responsible for the study. The next step is the conclusion. This is done by the investigator who is responsible for the study.

of §6 of the law.

The general rule is that the partial invalidity of a proposition of this kind vitiates the entire transaction. As was said in American Credit and Trust Co. v. New Era Chandelier Company, and Chicago Bonding and Surety Co., 208 Ill. App. 181: "*** It is the general rule of law that any part of an entire consideration for a promise or any part of an entire promise being illegal, whether by statute or common law, the whole contract is void ***."

To the same effect are Lyons v. Schanbacher, 316 Ill. 569; Pierce v. Shay, 145 Ill. App. 612; Evans v. American Strawboard Co., 114 Ill. App. 450.

Section 5 (h) of the Illinois Business Corporation Act grants to corporations generally the power to borrow money for its corporate purposes. Under the facts as stated in this bill we think it very doubtful whether the negotiation of this loan could be said (construing it strictly) to be for corporate purposes.

However, it is not necessary to decide all these questions. The injunction is only temporary and maintains the status pending a decision upon the merits. We hold that the court in its discretion might well maintain the status until the case has been heard, and that is all this injunction does. The order will be affirmed.

AFFIRMED.

McSurely, P. J., and O'Connor, J., concur.

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provision of a new law of 1934 (No. 1000).

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IN THE APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

OCTOBER TERM, 1941

JEAN H. WAXENBERG,

APPELLANT,

vs.

ETHEL G. BROWN, ET AL.,

(MICHELL, ALLEN, MATTHEW

& JORDAN, and DAVID J. PIFFERS,

APPELLEES)

APPEAL FROM THE CIRCUIT

COURT OF KANE COUNTY.

313 I.A. 267²

HUFFMAN, P. J.

Appellees at the instance of appellant filed a bill in 1933, to construe the will of appellant's mother. Subsequently, one of the heirs, Nathan Ginsberg, filed his cross-bill in April, 1936, for the same relief. Thereafter, on motion of Jean H. Waxenberg on March 1, 1938, her bill was dismissed. The case was later tried on the cross-bill of Nathan Ginsberg. An appeal was prosecuted to this court from the decree in that case, wherein that part of the decree construing the will was affirmed, and that part of the decree which allowed attorneys fees to Nathan Ginsberg and reserved jurisdiction of the case for the allowance of further attorney fees was reversed. (299 Ill. App. 225).

The case now before this court concerns an allowance of attorney fees to appellees, and against appellant, for services in connection with the bringing of her suit to construe the will.

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On January 21, 1941, the court entered its order awarding the attorney fees in question, against appellant. It is from this order that appellant prosecutes this appeal.

It appears that appellant had requested appellees to dismiss her suit subsequent to the filing of the cross-bill of Nathan Ginsberg, which sought the same relief; that such action was not taken by appellees, and that Mrs. Waxenberg appeared in court in person and procured the dismissal of her suit. It further appears that the cross-complainant, Nathan Ginsberg, consented thereto. It is generally considered that a complainant or plaintiff has the right to dismiss his bill on his own motion at any time before final decree. *Purdy v. Henslee*, 97 Ill. 389; *Gage v. Bailey*, 119 Ill. 539; *Clair v. Reading*, 99 Ill. 600; *Reilly v. Reilly*, 139 Ill. 180; *Langlois v. Matthiessen*, 155 Ill. 230; *Paltzer v. Johnston*, 213 Ill. 338; *Fischheimer v. Kupersmith*, 258 Ill. 392; *Whitaker v. Irons*, 300 Ill. 254; *Schaller v. Huse*, 330 Ill. 345. The cross-complainant consenting to such action on the part of appellant disposed of the rule with respect to such dismissal when a cross-bill had been filed.

It is generally considered that where a will is so ambiguous as to require resort to a court of chancery to obtain a construction of its terms, the costs of such litigation should be born by the estate. *Missionary Society v. Mead*, 131 Ill. 338; *Ingraham v. id*, 169 Ill. 432; *Arnold v. Alden*, 173 Ill. 229; *Wilson v. Clayburgh*, 215 Ill. 506; *Kendall v. Taylor*, 245 Ill. 617; *Keys v. Wohlgenuth*, 240 Ill. 586; *Guerin v. id*, 270 Ill. 239; *Ward v. Caverly*, 276 Ill. 416; *Alford v. Bennett*, 279 Ill. 375. However, it was held by this court with respect to the attorney fee sought to be recovered by Nathan Ginsberg (299 Ill. App. 225) that he had no present interest under the will, and in filing his cross-bill to construe the same, he was seeking personal gain only, and

pursuant to the rule announced in *Brumsey v. id*, 351 Ill. 414, 427, payment of solicitor's fees to such cross-complainant was improper when the court found such litigant to have no present interest under the will, and therefore no interest in its construction.

The court is of the opinion that the chancellor erred in awarding the attorney fees herein to appellees and against appellant. The control of her action remained with her as plaintiff, and she had the right to abandon and dismiss same. Any obligation on the part of appellant to appellees for legal services would appear to be no different from such situation as might exist generally between a client and attorney.

The judgment herein is reversed.

Judgment reversed.

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interest under the will, and therefore a interest in the estate-
improper when the court found such litigation to have no present
43V, payment of solicitor's fees to such cross-complainant was
pursuant to the rule announced in *Tracy v. Tracy*, 111 Cal. 434.

The court in all the opinion that the objection urged in
awarding the attorney fees denied to appellee is a matter of
ent. The control of her action remained with her plaintiff,
and she had the right to sue him and to sue him, and to sue him,
on the part of appellant to require for legal services would
appear to be no different from one of litigation in which appellant
generally between a client and attorney.
The judgment herein is reversed.
Judgment reversed.

OCTOBER TERM, 1941

APPELLEES.

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315 I.A. 268

APPEAL FROM THE CIRCUIT

COURT OF DuPAGE COUNTY.

The court is of the opinion that a freehold is involved in this litigation. As stated in the case of Lennartz v. Boddie,

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE DISTRICT OF COLUMBIA

DOCKETED

81-11-13

WILLIAM H. HARRIS

COURT OF THE DISTRICT OF COLUMBIA

MARIA J. HARRIS

ATTORNEY

vs.

WILLIAM H. HARRIS

ATTORNEY

HARRIS, et al.

Appellant was advised of her rights and she waived them.

She stated that she was married to William H. Harris and

been previously married. She stated that she was married to

and Mr. Harris, who was a resident of the District of Columbia

and that she was married to him for a period of ten years.

She stated that she was married to him for a period of ten years

and that she was married to him for a period of ten years.

She stated that she was married to him for a period of ten years

and that she was married to him for a period of ten years.

She stated that she was married to him for a period of ten years

and that she was married to him for a period of ten years.

She stated that she was married to him for a period of ten years

The plaintiff has no other claims.

The court is of the opinion that the plaintiff is entitled

to the sum of \$10,000.00 and costs of suit.

304 Ill. 484, at page 487, "A freehold is involved in all cases where the necessary result of the judgment or decree is that one party gains and the other loses a freehold estate, and also in cases where the title to a freehold is so put in issue by the pleadings that the decision of the case necessarily involves a decision of such issue." To the same effect are *City of Chicago v. C. B. & Q. R. R. Co.*, 319 Ill. 351; *Christie v. Sanitary District*, 330 Ill. 558; *Lederer v. Rosenston*, 329 Ill. 89; *Sobszenski v. Sobieski Building Ass'n.*, 327 Ill. 47; *Stolowski v. Wierzbowski*, 322 Ill. 74, and *Duncanson v. Lill*, 322 Ill. 528.

A suit to set aside and cancel a deed from a plaintiff upon the ground of fraud, involves a freehold, and an appeal from a decree therein lies directly to the Supreme Court. *Hursen v. id.*, 209 Ill. 466 (reported upon subsequent hearing in 212 Ill. 377). The foregoing case is cited with approval in *Litwin v. id.*, 375 Ill. 90, 92.

The complaint in this suit seeks to set aside warranty deeds executed by plaintiff to land of which she was seized in fee simple. The necessary result of this suit is that either the defendants will get title to certain of said premises to the exclusion of plaintiff, or that plaintiff will obtain title thereto by cancellation of her deeds, which will divest defendants of their title. Therefore, a freehold is involved, and the appeal should have been taken directly to the Supreme Court. Under such circumstances, it is the duty of this court to transfer the cause. *Feitler v. Dobbins*, 263 Ill. 78, 80; *McComb v. id.*, 238 Ill. 555, 556; Sec. 86 of the Practice Act (Ch. 110, sec. 210, Ill. St. 1941).

Pursuant to rule under such circumstances, and the provisions of the above section of the Practice Act, this cause

304 III. 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000

is ordered transferred to the Supreme Court, and the Clerk of this court is directed to transmit the transcript and all files in said cause to the clerk of that court.

Cause transferred.

When the Court of Sessions at Birmingham is ordered transferred to the Court of this county is directed to transmit to the Court of this county all the records and documents of the Court of Sessions at Birmingham as they relate to the County of Birmingham.

Witness my hand and seal this 1st day of March 1881.

IN THE APPELLATE COURT OF ILLINOIS

SECOND DISTRICT

OCTOBER TERM, 1941

TOWN OF THE CITY OF GALESBURG,)
KNOX COUNTY, ILLINOIS,)
APPELLEE,)

vs. :

TOWN OF KEWANEE, HENRY COUNTY,)
ILLINOIS,)
APPELLANT.)

APPEAL FROM THE CIRCUIT
COURT OF HENRY COUNTY.

313 I.A. 238²

HUFFMAN, P. J.

This is a suit by appellee against appellant to recover for money expended by appellee in and about the relief of John W. Bergstrom and family. He was a soldier in the first World War.

Appellant filed answer admitting the allegations of the complaint, and setting up as a defense that appellee made no special levy for the relief of indigent war veterans for the time in question, under the Bogardus act (Ch. 23, sec. 154, et seq. Ill. Statute 1941). Appellant denied liability for the assistance furnished to the pauper by appellee under the general statute enacted for the relief of the poor and needy. Appellant filed counterclaim for \$103.40 already paid to appellee for assistance furnished the individual and his family, during the time before appellant knew the pauper was a war veteran.

TOWN OF BARNSTABLE, MASSACHUSETTS
 EXHIBIT NO. 1000
 TOWN OF BARNSTABLE, MASSACHUSETTS
 EXHIBIT NO. 1000

W. Ferguson, a local ...
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Appellee filed its motion to strike appellant's answer and counterclaim. The motion was sustained. Appellant elected to stand by its answer, and judgment was entered for appellee and against appellant in the sum of \$150.26.

The sole question presented by this appeal is whether the Bogardus act is a defense to appellee's claim. The case of *People v. Mills Novelty Co.*, 357 Ill. 285, appears to be decisive of this point. The court in that case, in considering the Bogardus act, states on page 294, that such act does not prohibit a person who might be entitled to benefits thereunder from also obtaining benefits under the general statutes enacted for the relief of the poor.

The answer of appellant further set up that the American Legion, nor any other military organization in appellee town, had made any attempt to comply with the provisions of the above act so as to put it in operation. The act is not mandatory but merely provides a manner or method by which a post of any one of several designated veteran's organizations may cooperate with the overseer of the poor in the furnishing of relief to those enumerated in such act.

The court is not of the opinion that the answer set forth a good defense. The judgment is therefore affirmed.

Judgment affirmed.

Appellee filed motion to have appellee's name

removed from the record. The motion was sustained.

Appellee's name was removed from the record.

Appellee's name was removed from the record.

The court then proceeded to this appeal.

Appellee's name was removed from the record.

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The court then proceeded to this appeal.

Appellee's name was removed from the record.

Appellee's name was removed from the record.

Gen. No. 9692.

Ag. No. 6

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

OCTOBER TERM, A. D. 1941.

JOSEPH KUHAJDA, JR.,
(Plaintiff)--Appellee,
vs.
THE CHICAGO, ROCK ISLAND AND
PACIFIC RAILWAY COMPANY,
(Defendant)--Appellant.)

313 I.A. 269'

Appeal from
Circuit Court,
Will County.

WOLFE,-- J.

The Chicago, Rock Island and Pacific Railway tracks run practically due east and west through the City of Joliet. The Elgin, Joliet and Eastern Railroad tracks, known as the J, runs nearly north and south through said city and crosses the Rock Island tracks. Connecting the two tracks, there is a transfer track used in changing cars from one railroad to the other. This track

Gen. No. 9692.

Ag. No. 6.

IN THE
APPELLATE COURT OF ILLINOIS
SECOND DISTRICT

OCTOBER TERM, A. D. 1941.

JOSEPH KUHAJDA, JR.,)
(Plaintiff)--Appellee,)
vs.)
THE CHICAGO, ROCK ISLAND AND)
PACIFIC RAILWAY COMPANY,)
(Defendant)--Appellant.)

313 I.A. 269'

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Gen. No. 1030

THE
ASSOCIATED CO. OF AMERICA
CHICAGO DISTRICT
CHICAGO, ILL., U. S. A.

CHICAGO, ILL., U. S. A.

(JOSEPH KUNZ, JR.,
((PUBLISHED)---A. J. KUNZ,
(ve.
(THE CHICAGO, ILL. DISTRICT
(PACIFIC RAILWAY COMPANY,
((PUBLISHED)---A. J. KUNZ,
(

WOLF, --

The Chicago, ILL. DISTRICT
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Island tracks, and the
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is curved and connects with the Rock Island tracks at a point east of the main crossing of the two railroads and with the J, at a point north of said crossing. At about 12:30 p.m. on August 2, 1928, this track was occupied by a train of 52 freight cars being pushed in a northwesterly direction from the Rock Island yards to the yards of the J, railroad company. This train is commonly called a "cut," and was in charge of a switching crew consisting of Harry McSherry, C. F. Smilie and Patrick J. Murphy. McSherry was the foreman and was posted on the head end, which would be the car fartherest to the northwest. It was his duty to transmit signals to the engineer through C. F. Smilie, who was stationed on top of the train ten or twelve cars distant from McSherry. Smilie would then transmit the signals to the engineer in charge of the train. As this "cut," approached the J, right of way, a J, freight train was pulling out of the yards proceeding in a southerly direction, and it was necessary to stop the "cut," and remain on the transfer track until a right of way was clear on the J, line. At this time Murphy was stationed a short distance north and west from the head car ready to throw the switch and give the signal to McSherry to come ahead with his train.

On Aug. 2, 1928, Joseph Kuhajda, Jr., who was then about twelve years of age, lived with his parents on Henderson Avenue, in the City of Joliet, a short distance from the J, Railroad Freight

[illegible]

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Yard. On this day a friend and companion of Joseph Kuhajda, Jr., Joachim Gerat, a boy of about eleven years of age, came to Joseph's house and they decided they would go swimming at Silver Cliff, a popular swimming hole frequented by boys, located a short distance south of the Rock Island Tracks and east of the right of way of the J, tracks. The boys, in going to the swimming hole, had to wait for the freight train to pass on the J, tracks. They then crossed the J, tracks in a southeasterly direction to the transfer track in question. When they reached the first car, or the head end of the "cut," which was standing on the transfer track, they passed across said transfer track in front of the said first car to the east side and proceeded along the side of the cars. They observed that the "cut," was a long one, since they could not see the engine. They then crawled underneath the couplings of two freight cars. The Gerat boy was first, and was immediately followed by the Kuhajda boy. The Gerat boy got through without mishap and turned to look at the Kuhajda boy who was almost over the tracks, when the train started with a jerk, and a wheel ran over his right leg, which necessitated its amputation between the knee and the ankle. When the Gerat boy saw that his companion was hurt, he ran towards the head of the train and notified a trainman who was standing on the first, or head end box car. This man was McSherry who immediately applied the air brakes, and the train was abruptly stopped.

Yard. On this side of the road, the house of the
Josephine family, a small, one-story house, was
house and they lived there for many years. It was
popular with the family. The house was built
south of the road. The house was built
J. Thomas. The house was built
the first house. The house was built
tracks in a field. The house was built
When they moved to the house, they
was standing in the field. The house was
arch in front of the house. The house was
along the side of the road. The house was
for one, two, three, four, five, six, seven,
underneath the arch. The house was
first, and then the second house. The house
boy got into the house. The house was
boy who was named John. The house was
John, and a few years later, the house was
emulation between the two houses. The house was
that his son was named John. The house was
and notified the family. The house was
John was named John. The house was
John, and a few years later, the house was

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On March 16, 1937, Joseph Kuhajda, Jr., started suit against the Chicago, Rock Island Pacific Railway Company for the damage he sustained because of the accident in question. There is only one count in the complaint, and it charges the defendant with wilful and wanton misconduct, the proximate cause of which injured the plaintiff, and it is as follows: "That at the time and place aforesaid plaintiff who was a minor of the age of twelve (12) years was walking on the right of way along the side of said train of cars then and there being operated as aforesaid upon said switch track within the view and hearing of one of the servants of the defendant in charge of said train of cars; that plaintiff was known by defendant's servant to be then and there upon said right of way and intending to cross through the said train of cars from the east to the west side thereof, but defendant, by its servant, aforesaid, then and there wilfully and wantonly, and with utter disregard for the safety of plaintiff, caused and permitted the said train of cars to be suddenly put into motion without sounding any whistle or bell or otherwise warning plaintiff of the movement of said cars, and as a proximate consequence of such wilful and wanton conduct of defendant, plaintiff was thereby injured."

The defendant filed its answer in which it admitted that it was the owner and operator of a railroad in Joliet, Will County,

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Illinois, and that it was operating the train in question, and that plaintiff was on the right of way near said train of cars, but denied that the defendant, by his agent or servant in that behalf, knew that the plaintiff was on the said right of way and intended to cross through said train of cars, and denied that the defendant, by its agent or servant, then and there wilfully and wantonly caused and permitted the said train of cars to be suddenly put into motion, and denied that the plaintiff was injured, as a proximate result of the wilful and wanton conduct on the part of the defendant, or its servant or agent.

The case was tried before a jury who found the issues in favor of the plaintiff and assessed his damages at \$10,000.00. At the close of plaintiff's evidence and of all evidence the defendant entered motions to direct a verdict in their favor. The Court denied their motions and marked the instructions, "refused." Judgment was entered on the verdict in favor of the plaintiff in the sum of \$10,000.00. A few days later, the Court granted leave to the defendant to file a motion for a new trial. A written motion was filed and specified many reasons for the same, but the Court overruled this motion. It is from the judgment of \$10,000.00 that this appeal is prosecuted.

Joseph Kuhajda, Jr., and his boyhood friend, Joachim Gerat,

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each testified that, as they came around the northerly end of the "cut," of cars, they saw a man sitting on the east side of the car, (that is, on the northeast side of the car,) with his feet hanging over the side of the car, and with a club in his hand. Kuhajda also stated, that as he and his friend passed the car, the man sitting on the car said: "Boys, are you going swimming." To which Joseph replied, "Yes." They further testified that was the only conversation they had with the man sitting on the car. That the boys did cross the track between two of the defendant's cars, is admitted, but there is a conflict in the testimony as to where they crossed. The plaintiff and his witness claim it was between the first two cars at the northerly end of the track. The defendant's witnesses all insist that it was several car lengths farther towards the southeast.

Joachim Gerat corroborated the plaintiff in stating that the man sitting on the car was at the northeast corner of the car with his feet hanging over and resting upon the ladder on the side of the car. He also stated that this man had a club in his hand.

Harry McSherry was called as a witness on behalf of the defendant. He testified that he was a switch foreman prior to Aug. 2, 1928, and had been continuously since that time; that on that date he was in charge of the train in question. He stated that at no time while the train was stopped on this "cut," preparatory to

each testified that, on the day in question, they were in the car, and that they were in the car at the time the car was stopped at the curb. (That is, on the day in question, they were in the car, and they were in the car at the time the car was stopped at the curb.)

over the side of the car, and they were in the car at the time the car was stopped at the curb.

stated, that as he was in the car, he saw the car stop at the curb, and that he saw the car stop at the curb.

on the car said: "They were in the car, and they were in the car at the time the car was stopped at the curb."

replied, "Yes." They were in the car, and they were in the car at the time the car was stopped at the curb.

they had seen the car stop at the curb, and they were in the car at the time the car was stopped at the curb.

the track between the car and the curb, and they were in the car at the time the car was stopped at the curb.

is a conflict in the testimony of the witnesses, and they were in the car at the time the car was stopped at the curb.

tiff and his wife were in the car, and they were in the car at the time the car was stopped at the curb.

northwardly and they were in the car, and they were in the car at the time the car was stopped at the curb.

that it was seen from the curb, and they were in the car at the time the car was stopped at the curb.

located in the car, and they were in the car at the time the car was stopped at the curb.

the man sitting in the car, and they were in the car at the time the car was stopped at the curb.

with his feet on the curb, and they were in the car at the time the car was stopped at the curb.

of the car, and they were in the car at the time the car was stopped at the curb.

they were in the car, and they were in the car at the time the car was stopped at the curb.

celebrant, and they were in the car at the time the car was stopped at the curb.

Aug. 2, 1934, and they were in the car at the time the car was stopped at the curb.

date is the date of the car, and they were in the car at the time the car was stopped at the curb.

no time at all, and they were in the car at the time the car was stopped at the curb.

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going on to the J, tracks, was he sitting on the side of the car with his feet hanging over the side, or on the ladder, but at all times he was sitting on what is commonly called the run way, that runs down the center of the top of the car; that at no time did he see either of the boys in question, until the Gerat boy called to him; "that they had ran over some one;" that he did not have a club in his hand; that as soon as he learned some one had been hurt, he stopped the train by means of an air brake, which was right in front of him. He stated that from the time the train started, that it had moved about the distance of one car length when he heard the boy calling to him; that he immediately stopped the train; that he did not have any intention of injuring any one and had no knowledge whatsoever, that the plaintiff and his companion were intending to crawl through the train.

C. F. Smilie also a witness on behalf of the defendant, testified that he was a switchman, and at the time in question, was working for the Rock Island Company and was on top of the train during the time it was waiting to go upon the J, tracks; that he was about eleven or twelve cars south and east of McSherry; that in his opinion, the train was on the Y for a period of about twenty minutes before the accident happened; that when McSherry stopped the train, he got down off of the car and walked up to where the plaintiff was standing;

going on to the 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000

O. H. B. ... testified that ... working for the ... the time it was ... eleven on ... the train was ... the ... down off of ...

8.

that he was leaning against the west side of about the twelfth or thirteenth car from the head, or north end of the train, and that McSherry was on the first car. He said during the whole time, that he was sitting on the car waiting for it to proceed to the J, tracks he was in plain view of McSherry and that McSherry was sitting on the board, which is called a cat walk which is used to walk from one car to the other; that he did not see McSherry move from that position any time the train was standing there; that when he, (Smilie,) got off of the train, the plaintiff was not over a half a car length from the car on which he had been riding. He further testified that he did not see the boys until after the accident happened.

Patrick J. Murphy testified that he was a member of the crew in charge of the train in question, and was employed by the Rock Island Railway Company; that he was at the switch between four and five car lengths from the north end of the train; that at all this time McSherry was in full view from where he was; that during that time he observed the position of McSherry on the head car; that he was sitting on top of the car in the middle, on the cat walk, as he called it, or the run way; that at no time did he see the boys in question, until after the accident occurred.

Mr. E. A. Vogel testified that he lived in Little Rock, Arkansas, at the time of the hearing; that on Aug. 2, 1928, he was

that he was looking against the west side of the road and looking
thirtieth and from the west, or north end of the road, and that
McGherly was on the right side. He said during the whole time, that
he was sitting on the car looking low in the road to see if he could
be in plain view of McGherly and that McGherly was sitting on the
board, which he called a car wheel which is used to run from one
to the other. He said that McGherly had been in that position
any time the train was standing. That McGherly was sitting on the
off of the train, the platform, and was looking at the car. He said
from the car on which he had been sitting. He said that McGherly
that he had not seen the body until after the train had stopped.
Patrick J. Murphy, testified that he was a member of the
crew in charge of the train in question, and was employed by the
Rock Island Railway Company; that he was on the train between
and five car lengths from the rear end of the train; that at this
time McGherly was in plain view from where he was sitting; that
that time he observed the position of McGherly on the board; that
he was sitting on the car, or on the platform, on the west side,
as he called it, of the road; that he did not see McGherly
in question, until after the accident occurred.
He said that McGherly was sitting on the board, which he called
Arkansas, and that he was looking at the car.

9.

employed by the Rock Island Railway Company, as a claim adjuster, and was in Joliet with reference to this accident in question; that on August 9, seven days after this accident took place, he had a talk with Joachim Gerat; that he had several conversations with the Gerat boy on or about August 9, 1928; that he went with the Gerat boy to the scene of the accident and had him describe how the accident occurred; that they were accompanied by the injured boy's father and one of his sisters; that the Gerat boy told them that the accident occurred because Joseph caught his foot in the switch stand, and was run over by the head car; that the switch was not thrown from the ground, but thrown from the tower; that they all walked over to the nearest switch stand, and found that no levers connected with this switch, but it had to be thrown by hand; that the Gerat boy then said the accident did not occur that way, but the boys were crawling between the ends of two cars on the "cut," of cars on the transfer track; that the Gerat boy crawled through first, and that Joseph was nearly through when his foot was run over; that they then went to the hospital where the injured boy was confined, and had a talk with him relative to the accident; that the Gerat boy made a statement for him, which was reduced to writing, and signed by the Gerat boy; (that this is defendant's exhibit 1,) that he bought the Gerat boy's lunch and took him home;

employed by the Rock Island Railway Company, and a state of affairs
and was in fact, with reference to the accident, in a position
that on August 2, seven days after the accident, he had a
a talk with Joseph's father; that he had several conversations with
the Gerat boy on or about August 1, 1901; that he had with him
Gerat boy to the scene of the accident and that he decided for the
accident occurred; that they were accompanied by two other boys,
father and one of his sisters; that the Gerat boy told him that
the accident occurred because Joseph was standing on the switch
stand, and was run over by the locomotive; that the switch was
thrown from the ground, but thrown from one tower; that they all
walked over to the nearest switch stand, and found that it
connected with the switch, but it had been broken; that
the Gerat boy then told him the accident had not occurred that way, but
the boys were standing in front of the switch, and the locomotive
of cars on the ground; that he then told him the accident occurred
first, and that Joseph was standing on the switch stand
over; that they then went to the place where the accident
was confined, and he saw the switch stand, and the accident
that the Gerat boy was a defendant in the case, which was
writing, and that he was a defendant in the case; (the defendant's defense was
exhibit 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100, 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000)

10.

that the statement was taken on a portable typewriter; that after the statement was typewritten, the Gerat boy read the statement, and was asked if it was correct. He stated it was, and the boy then signed it.

The above statement was produced and shown to Joachim Gerat while he was testifying. He was asked if the signature to the statement was his, and if he signed the statement. He denied all knowledge of such statement, or that he had ever signed it. At the request of the defendant's attorney, Joachim Gerat, signed a piece of paper with his own signature. The original Exhibit, together with the signature written by the witness, Gerat, have been certified to this Court for inspection. While this Court does not claim to be handwriting experts, we are all of the opinion that the signature of Joachim Gerat, attached to defendant's Exhibit 1, and the signature of Joachim Gerat, attached to defendant's Exhibit 2, were written by one, and the same person.

A reading of this Exhibit 1, discloses that there is no mention made of the fact that they saw anybody on the train, as they went around the north end of it, or that any one on the train talked to them, or saw them at any time before the accident happened.

It will be observed that the complaint charges that plaintiff was known by defendant's servant to be then and there upon said right of way, and intending to cross through said train of

and was asked to explain it.

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cars from the east to the west side thereof, but defendant, by its servant aforesaid, then and there wilfully and wantonly, and with utter disregard for the safety of plaintiff, caused and permitted said train of cars to be suddenly put into motion, without sounding any whistle or bell, or otherwise warning said plaintiff of the moving of said cars, and as a proximate consequence of such wilful and wanton conduct of said defendant, the plaintiff was thereby injured. To sustain this judgment, this Court will have to say that Harry McSherry, with full knowledge of the fact that one, or both of these boys were attempting to crawl between two freight cars, deliberately signalled the train to start, and as a result thereof, the boys were injured. From the reading of the evidence in this case, we have come to the conclusion that the verdict of the jury is contrary to the manifest weight of the evidence, and that the judgment cannot stand.

The appellant has assigned error in regard to the instructions given by the trial court. We do not find any reversible error in the plaintiff's given instructions. They also complain of the defendant's refused instruction, which is as follows: "The court instructs the jury that if you believe from a preponderance of the evidence that, at the time and place in question, the servant of the defendant in

cars from the rear of the train. The cars were moving
 its servant on wheels, and the servant was standing
 with utter disregard for the safety of the cars, and the
 said train of cars in the rear of the train, and the
 any whistle or bell, or of any other signal of the
 moving of said train, and the servant was standing
 and wanted to get on the train, and the servant was
 injured. The servant was standing on the train, and the
 that Harry Johnson, the servant, was standing on the train,
 both of these facts were known to the servant, and the
 cars, deliberately, and with a full knowledge of the
 thereof, the servant was injured. The servant was standing
 in this case, the servant was standing on the train, and the
 injury is caused by the servant's own negligence, and the
 judgment cannot be made.

The servant was standing on the train, and the servant was
 given by the servant, and the servant was standing on the train,
 plaintiff's servant, and the servant was standing on the train,
 refused to get on the train, and the servant was standing on the train,
 jury what the servant was standing on the train, and the servant was
 at the time of the injury, and the servant was standing on the train,

12.

charge of the train was not guilty of a particular intention to injure or was not guilty of such wilful and wanton recklessness as would justify a presumption of an intent to injure generally, then you will find the defendant not guilty." This was practically the charge of the plaintiff's complaint, and it was incumbent upon the the plaintiff to prove such facts. While there are other instructions that might cover these points, we think the Court would have been justified in giving this refused instruction.

The judgment of the Trial Court is hereby reversed and the cause is remanded.

Reversed and Remanded.

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42174

IDA SCHWAAN,
(Plaintiff)

Appellee,

v.

EUGENE F. SCHWAAN, JR.,
et al.,

Defendants.

EUGENE F. SCHWAAN, JR.,
(Defendant)

Appellant.

INTERLOCUTORY

APPEAL FROM SUPERIOR COURT
OF COOK COUNTY.

312 I.A. 269²

MR. PRESIDING JUSTICE SCANLAN DELIVERED THE OPINION OF THE COURT.

This is an interlocutory appeal by defendant Eugene F. Schwaan, Jr., from an order appointing a receiver upon a bill for partition. No evidence was heard. The trial court appointed the receiver upon the pleadings.

Plaintiff filed her verified bill for partition on November 7, 1941. It alleges, in substance, as follows: 1. That her husband, Eugene F. Schwaan, Sr., died on September 16, 1939, leaving a will which disposed only of his personal property; that defendant Eugene F. Schwaan, Jr., was appointed by the Probate court of Cook county, Illinois, as executor of the last will and testament of Eugene F. Schwaan, Sr., on December 1, 1939. 2. That the decedent died seized in fee simple of the following intestate property, to-wit: (Here follows legal description.) 3. That plaintiff, the widow of the decedent, became vested with a third interest in the real estate; that defendant Eugene F. Schwaan, Jr. (hereinafter referred to as appellant), as executor, is administering the real estate in accordance with the statute in such case made and provided; that plaintiff, as the widow of the decedent, waived her right of dower in the said real estate by failing to file

ASIA

101 SOUTH
(11/11/11)

W.

SWANSON, J. W. (Defendant)
et al.,

SWANSON, J. W. (Defendant)
(Defendant)

Defendant.

MR. PROSECUTOR, UNITED STATES

This is an information.

Schwartz, Jr., from an original return filed in this court for partition. No will has been filed. The trial court has ordered the receiver upon the partition.

Plaintiff filed her petition for partition on

November 7, 1941. It also set an answer, a following is:

That her husband, J. W. Schwartz, Jr., died on September

16, 1939, leaving a will in which he left his property to his

property; that she and her husband, J. W. Schwartz, Jr.,

by the probate court of Cook County, Illinois, on the 16th of

the last will and testament of J. W. Schwartz, Jr.,

on the 16th of September, 1939. It also set an answer, a following is:

That of the following (the first of which is set out below)

follows (the first of which is set out below)

of the defendant, became vested with the title to the

real estate; that the title of J. W. Schwartz, Jr.,

referred to as real estate, as set out in the first of the

estate in a conveyance made by J. W. Schwartz, Jr.,

provided; that the title, as set out in the first of the

part of the conveyance made by J. W. Schwartz, Jr.,

of record for one year after letters of administration were issued to appellant. 4. That plaintiff, as widow, is entitled to one-third of the real estate, and that the remaining two-thirds is vested in fee simple in the decedent's three children, appellant, Gertrude and Mildred, all married, Gertrude residing in California and Mildred in Germany. 5. That on February 3, 1941, the Probate court granted plaintiff a widow's award of \$1,500, which has never been paid and should be paid in any event out of the proceeds of the sale of the real estate. 6. That the real estate is improved with a two-story brick building, consisting of two stores and four apartments, that all of the space is rented except one store, and that the total aggregate monthly rental is \$285. (Here follows a recital of the names of the tenants and the nature of each tenancy.) 7. That ever since the death of said Eugene F. Schwaan, Sr., appellant has collected the rents from said tenants and has failed to pay to the plaintiff her share of the rents, issues and profits; that appellant should be compelled, by order and decree of the court, to account to the plaintiff for her just share of the same; that a receiver should be appointed pendente lite to collect the rents, issues and profits; that the said tenants, Ben Pollen, Herman Gutman, Hilda Hansen, Waldo Starr and John Doe James, defendants, have no interest in said real estate other than as tenants. 8. That plaintiff has demanded of appellant a settlement according to her rights and interests in and to the said real estate, but that said defendant has failed and refused so to do. 9. That plaintiff is desirous that a partition or division shall be made of the premises between her and appellant, Gertrude and Mildred according to their respective rights, estates and

interest therein. 10. That she has frequently applied to the said defendants and requested them to come to an equitable division or partition of the above described premises, or in case they cannot agree upon an amicable division, that they join in making a sale of the premises and divide the proceeds thereof, but that the said defendants have refused to enter into any division or sale of the premises. Plaintiff prays for an accounting and distribution of the rents from appellant; that a receiver be appointed pendente lite, with the usual powers of receivers in like cases; that the widow's award allowed to her by order of the Probate court of Cook county in the sum of \$1,500, which remains unpaid, be made a charge or lien upon said real estate and paid out of the proceeds of any sale thereof; that a division and partition of the real estate be made; that in case a partition cannot be made without manifest prejudice to the parties that the same may be sold under the direction of the court and the proceeds thereof distributed between the parties entitled thereto according to their respective rights.

Appellant filed an answer to the bill. As to the allegations in paragraphs 1 to 5, inclusive, of the bill, he raises no issue save that he denies that the widow's award is still owing and that it should be paid out of the proceeds from the sale of the property. He admits the allegations in paragraph 6. As to the allegations in paragraph 7 he admits that the tenants have no interest in the real estate except as tenants, and denies all other allegations. He denies the allegations contained in paragraphs 8 to 10, inclusive. He makes the following "affirmative defenses": That the estate

of Eugene F. Schwaan, Sr., is still open and the probate thereof is still pending in the Probate court of Cook county; that on April 4, 1941, upon motion of plaintiff, the Probate court entered an order directing appellant, as executor,, to sell, if necessary, the real estate involved in the partition suit, and out of the proceeds thereof to pay the widow's award, all allowed claims and the cost of administration; that the personal estate of Eugene F. Schwaan, Sr., in appellant's hands as executor is insufficient to pay all allowed claims in the estate, after the payment of the costs and expenses of administration; that unless appellant, as executor, can discover and reclaim additional personal property of the decedent, it may be necessary to sell the real estate; that all holders of allowed claims against the estate have an interest in said real estate, and as such are necessary and indispensable parties to the partition proceeding; that defendant Mildred Schwaan is a citizen of Berlin, Germany, and pursuant to the Trading with the Enemy Act of the United States, her interest falls within the jurisdiction of the Alien Property Custodian, or his successor in office, who is therefore a necessary and indispensable party to this proceeding. Appellant also filed a "counterclaim," which alleges:

1. That Eugene F. Schwaan, Sr., during the time that he was married to the plaintiff was totally blind and incapable of handling his business and financial affairs without relying heavily upon the assistance of others.
2. That said decedent was a man of considerable means, and shortly before his death owned several large bank accounts, in addition to the real estate involved herein; that the income from the real estate alone amounted to approximately \$3,000 a year over and above

of William F. Johnson, Jr., a still-born child, and the
trust of its still-born child, and the
county, first on April 4, 1901, and second on April 11, 1901.
The trustee court entered an order in the following terms:
"as executor, to sell, if necessary, the real estate of
involved in the partition suit, and out of the proceeds thereof
to pay the widow's dower, all other claims and debts of the
administration; that the personal representative of the estate of
Dr. J. H. Johnson, Jr., executor of the estate of the said
all allowed claims in the estate, and the expenses of administration;
costs and expenses of administration; and also as executor,
and also as executor, and also as executor, and also as executor,
property of the decedent, and also as executor, and also as executor,
real estate; that all claims of the estate of the said
estate have an interest in said real estate, and also as executor,
necessary and indispensable parties to the partition suit;
ing; that defendant Alfred Johnson is a citizen of the State of
Germany, and resident of the Republic of the State of the
United States, and interested in the real estate of the
the said property, and also as executor, and also as executor,
is therefore a necessary party to the partition suit;
ceding, appeal be also filed in the court of the State of
I. The said appeal, and also as executor, and also as executor,
related to the plaintiff's claim, and also as executor, and also as executor,
maintaining his claim, and also as executor, and also as executor,
sively upon the last or use of the said real estate;
and also as executor, and also as executor, and also as executor,
and also as executor, and also as executor, and also as executor,
and also as executor, and also as executor, and also as executor,
and also as executor, and also as executor, and also as executor,

taxes and assessments. 3. That in spite of the size of decedent's income and the volume of his personal estate, only \$926.66 was received by appellant as executor; that plaintiff has persistently refused to account to appellant for the balance of decedent's personal estate, and has refused and failed to explain the whereabouts or disposition of the moneys which constituted the income from the said real estate paid by the tenants prior to the death of the decedent. 4. That for several months after the decedent's death, plaintiff collected the rents and income from the said real estate, but failed to render any account or make any division or distribution to appellant or the other heirs of the decedent. 5. That during the time that appellant has been in possession of the said real estate and collected the rents and income therefrom, he has kept an accurate account thereof and has been ready, willing and able to render a true and accurate report thereof at any time. The counterclaimant prays: That the plaintiff render to this court an accounting of all rents and income received or collected by her with respect to the said real estate, both prior to the death of Eugene F. Schwaan, Sr. and since that time; that the court order the plaintiff to pay to appellant as executor such sums as rightfully constitute the personal estate of the decedent, and to pay to appellant and to the other heirs such portions of the rents and income received after the death of the said decedent as rightfully belong to them; that such additional persons be made parties defendant herein as will give the court jurisdiction over all persons having any interest in said real estate; that further action in this case be suspended until appellant as executor can determine whether it will be necessary to sell the said real estate in order to pay claims and expenses in the probate of the estate of

Eugene F. Schwaan, Sr. The answer and counterclaim were both verified.

The question presented on this appeal is whether the trial court, upon the pleadings, was justified in appointing a receiver. Appellant contends: "I. There is nothing in the record to justify the trial court in appointing a receiver. * * * The applicant for a receiver must show that the property itself, or the income from it, is in danger of loss from neglect, waste, misconduct or insolvency. The burden rests with the applicant for a receiver to present facts showing the necessity for the appointment. II. A receiver should not be appointed in a partition suit except for clear and impelling reasons." Plaintiff contends: "I. The record contains ample facts to justify the trial Court in appointing a receiver. The rule applicable here is that the Court may appoint a receiver where one joint tenant excludes the other and has collected all of the rents and refuses to account. He has not paid the taxes. Also for the additional reason that there is strong ill will existing between said co-tenants. II. The Court could see from the pleadings and the facts presented by counsel that there were clear and impelling reasons why a receiver should be appointed."

That the appointment of a receiver in a partition proceeding is not a common practice in this State is evident from the fact that neither party to this appeal has cited an Illinois case where a receiver was appointed in a partition proceeding. We have found one, Ames v. Ames, 148 Ill. 321. That case presents unusual facts. From the opinion (pp. 338, 339) it appears that "after a large amount of testimony had been taken and the master in chancery had filed his report, in which he found that it was for the interest of the minors that partition be made or the

Eugene T. Johnson, Jr. ... verified.

The question ... trial court, upon the findings, the fact that ... a receiver. Appellant contends that there is nothing in the record to justify the trial court in appointing

receiver. * * * The appellant further contends that the loss from neglect, waste, mismanagement and other

burden rests with the defendant, for a receiver is appointed to administer the estate of a decedent, and the facts showing the necessity for the appointment are

receiver should not be appointed in such a situation and except for clear and compelling reasons, the trial court should not appoint a receiver. The appellant contends that the record contains ample facts to justify the trial court

in appointing a receiver. The appellant further contends that the Court may appoint a receiver upon the facts and circumstances the other and has collected all of the assets and proceeds to

account. He has not paid the taxes, and also for the personal reason that there is a strong possibility of a loss of the co-tenants. II. The Court could not find any other facts and

the facts presented by the appellant that the estate is insolvent and that the facts presented by the appellant are not sufficient to justify the appointment of a receiver. The appellant contends that the facts presented by the appellant are not sufficient to justify the appointment of a receiver. The appellant contends that the facts presented by the appellant are not sufficient to justify the appointment of a receiver.

That the appointment of a receiver is not a matter of course and that the fact that the estate is insolvent is not sufficient to justify the appointment of a receiver. The appellant contends that the facts presented by the appellant are not sufficient to justify the appointment of a receiver. The appellant contends that the facts presented by the appellant are not sufficient to justify the appointment of a receiver.

to have found any other facts and circumstances that would justify the appointment of a receiver. The appellant contends that the facts presented by the appellant are not sufficient to justify the appointment of a receiver. The appellant contends that the facts presented by the appellant are not sufficient to justify the appointment of a receiver.

in summary he filed his response, in which he stated that for the first time he had been able to locate the assets of the estate.

property sold in the ordinary course of law, the court appointed the Chicago Title and Trust Company receiver of the real and personal property of the deceased, including one hundred and eighteen railroad coal cars. The receiver was authorized to operate and conduct the mine, tile works and store, and to rent any part of the real estate," and the receiver was ordered to execute a lease to the adult heirs of the Minonk property during the minority of the minor complainants. The Supreme court reversed the entire decree upon the ground that the Circuit court of Cook county had no right (p. 346) "to step in and oust the probate court of its jurisdiction over the minors' property," and the cause was "remanded, with directions to the circuit court to allow the partition proceedings to proceed in the ordinary manner." In its opinion, the court stated (p. 340): "The appointment of a receiver in a partition proceeding is not of frequent occurrence, but, pending the litigation, we think the law is well settled that the court has ample power, upon a proper showing, to make the appointment. Freeman on Co-tenancy, after discussing the question at some length, (sec. 327,) concludes as follows: 'In partition, the court will appoint a receiver during the pendency of the action, to preserve the complainants from serious loss, when it is shown that they are unable to rent portions of the property, or to collect rent of other portions rented, in consequence of the conduct of the defendant.'" In 47 C. J. 397, it is stated: "The power to appoint a receiver as an incident of the jurisdiction to partition property can, of course, be exercised only by a court of chancery, and the authority to appoint a receiver should be exercised only for cogent reasons and with extreme caution, so that no injury will result to the parties whose rights are for the time being invaded." "The appointment of a receiver to collect rents

[in a partition proceeding] pending the proceedings is not, however, authorized where there is nothing to show any real necessity therefor or imminent danger of loss. * * * but if a tenant in possession does not dispute the title, or interfere with his cotenants, it is not proper to appoint a receiver, particularly where it is not averred that the defendant is insolvent." (20 R. C. L. 769.) "Protection and preservation of the property, or the rents and profits thereof, from injury, waste, removal, conversion, or destruction, is a sufficient ground for the appointment of a receiver in an action for partition and is the most common ground for such appointment; and the rule has been frequently applied in the case of mining property." (47 C. J. 398.) Mining property was involved in Ames v. Ames, supra.

From the pleadings the following facts appear: Appellant is the owner of an undivided two-ninths' interest in the property in question. The decedent, in his will disposing of his personal property, named him executor. The will was probated in the Probate court of Cook county and letters testamentary issued to appellant as executor. The only personal estate of the decedent which has come into appellant's hands as executor is \$926.66. There are unpaid claims against the estate and the Probate court has allowed plaintiff a widow's award of \$1,500. The decedent's estate is still in probate and the assets of the estate are insufficient to pay debts and charges of administration. On April 4, 1941 (the instant bill was filed on November 7, 1941), the Probate court directed the executor to sell the real estate if found necessary in order to pay the debts and charges. The building is approximately eighty-five per cent rented and the entire rental is \$285 a month. For several months after the decedent's death plaintiff collected the rents. The executor is now in possession and is

collecting the rents. Neither one has rendered an accounting to the other heirs. Appellant says that he has kept an accurate account of his receipts and has at all times been able and willing to render a report thereof. It will be presumed that appellant, as executor, is acting under bond. Plaintiff alleges in her bill that appellant "is administering said intestate real estate in accordance with the Statute in such case made and provided." There is no allegation that he is improperly excluding any of the other owners from the premises or that plaintiff had sought the possession of the premises or any part of them, or that she had been ousted by the executor from the premises. Nor is there any allegation of mismanagement or waste by appellant. In fact, plaintiff alleges that the building is approximately eighty-five per cent rented. There is no allegation that appellant is insolvent and unable to respond in damages, nor that appellant's interest in the property is not sufficient security for plaintiff's interest in the rents which have been collected. Appellant concedes that he has not accounted to plaintiff for her share of the rents, but plaintiff makes no allegation that she had ever asked appellant to account for her share of the rents. Appellant alleges that plaintiff collected the rents for several months after decedent's death and has not accounted to the other owners for the same, and appellant contends that until plaintiff accounts for the rents she collected he has no way of knowing what is her rightful share in the moneys he has collected, and he alleges in his pleadings that he "has kept an accurate account thereof and has been ready, willing and able to render a true and accurate report thereof at any time."

In support of the order appointing the receiver counsel

for plaintiff have made statements of alleged facts that are not based upon any allegations in the pleadings. This is not a commendable practice and does not aid plaintiff's cause. Plaintiff's counsel argue that appellant has not fulfilled his duties as executor in the Probate court proceedings and that he has not complied with orders of the Probate court. This argument is not warranted by the pleadings, but even if the charge were true, the proper place to make it is the Probate court.

We find that the order appointing a receiver was not warranted by the allegations of the pleadings and we see no good reason why the property in the instant case should be burdened with the costs incident to a receivership.

The interlocutory order of the Superior court of Cook county appointing a receiver is reversed.

INTERLOCUTORY ORDER APPOINTING
RECEIVER REVERSED.

Sullivan and Friend, JJ., concur.

-12-

for plaintiff we have seen that the defendant has not
based upon any allegations in the complaint. This is not a
comprehensible question and the defendant has not
plaintiff's counsel argues that the defendant has not
an exception in the plaintiff's favor and that he has not
complied with the requirements of the complaint. It is not
warranted by the complaint, and the defendant has not
the proper basis for the complaint.

It is not the duty of the defendant to prove that
warranted by the complaint of the defendant. It is not the
reason why the defendant in the complaint is not
with the costs incurred by the defendant.
The information contained in the complaint is not
country of the defendant. It is not the duty of the
defendant to prove that the defendant is not the
defendant.

Plaintiff and Defendant, et al.,

Abstract

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

313 Ill. App.
4th Dist.
4-14-2
FEBRUARY
October Term, 1914.

Gen. No. 9304.

Agenda No. 3.

Carl G. Strawn,
Plaintiff-Appellee,

-vs-

Harold Perbix,
Defendant-Appellant.

Appeal from

County Court

Morgan County.

Fulton J:

313 I.A. 351-67

On Sunday, November 19, 1939, Evelyn Strawn, wife of the Plaintiff-Appellee, Carl G. Strawn, while driving south on Southeast Street in the City of Jacksonville in her husband's car, came in contact with the car of the Defendant-Appellant, and the right front fender and running board of Appellee's car was damaged as a result of such collision.

Suit was started by Appellee against Appellant in Justice of the Peace Court where judgment was entered in favor of the Appellant.

On appeal the case was tried in the County Court of Morgan County, without a jury, where a finding and judgment was entered against the Appellant for the sum of \$35.00, and costs of suit. From that judgment Appellant has perfected an appeal to this Court.

The witnesses for Appellee, consisting of the wife of the Plaintiff-Appellee, who was driving the car, a young girl who was sitting in the front seat of her car, and one Ruth Strawn who was on her front porch across the street from the scene of the accident, testified that the car of the Appellant was parked on the west side of

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Southeast Street headed south; that a number of automobiles were also parked along that side of the Street by people attending Church services at the Lutheran Church located on the Northwest corner of the intersection of Southeast Street and East Beecher Avenue; that the Appellant came out of the church, got in his car, started it, turned to the left and ran into the front end of the Strawn car as it was passing.

The Appellant testified that when he entered his car, he released his brake and allowed the car to coast down grade against the bumper of the car directly in front of him; that as it moved forward he turned the front end of his automobile slightly outward and while it was in a standing position Mrs. Strawn drove by and collided with the front end of his car. Mrs. Strawn further testified that she was driving carefully at a speed of about 15 miles per hour, which was disputed by witnesses for the Appellant.

There is no question of law involved in this appeal. Appellant insists that Mrs. Strawn was guilty of contributory negligence in not anticipating that cars so parked might at any time be turning into the street. The Appellant gave no signal of any kind of his intention to turn into the street.

The question of contributory negligence is one pre-eminently for the consideration of a jury, as such negligence cannot be defined in exact terms, and unless it can be said that the action of a person is clearly and palpably negligent it is not within the province of the Court to substitute its judgment for that of the jury. *Blumb v. Getz*. 366 Ill. 273.

In Meyer v. Hendrix, 311 Ill. App. 605, the Court said:

"These controverted questions of fact were primarily questions of fact for the trial judge, sitting as a trier of fact, in the absence of a jury. The finding of the trial court judge on the controverted facts is entitled to the same weight as the verdict of a jury. Moore v. David J. Molloy Co., 222 Ill. App. 295. The judgment of that Court who saw the witnesses and heard them testify is conclusive on all questions of fact, if not manifestly against the weight of the evidence."

While the proof in this case is somewhat conflicting, a reading of the entire record discloses ample evidence to sustain the finding of the County Court in favor of the Appellee and the judgment of that Court is affirmed.

AFFIRMED.

In *Wager v. Bennett*, 111 Ill. 471, 1874.

"These authorities were cited in the case of *Wager v. Bennett*, 111 Ill. 471, 1874, where the court, sitting in banc, affirmed the judgment of the trial court, which was based on the discovery of the fact that the defendant had been in the city of Chicago at the time of the commission of the crime. The court in that case held that the evidence was sufficient to establish the fact that the defendant had been in the city of Chicago at the time of the commission of the crime. The judgment of the trial court was affirmed." *Wager v. Bennett*, 111 Ill. 471, 1874.

While the proof in this case is not as strong as in the case of *Wager v. Bennett*, the reading of the entire record discloses the evidence which supports the finding of the Grand Jury. The finding of the Grand Jury is affirmed.

111 Ill. 471.

Abstract

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

FEBRUARY
October Term, A.D. 1941.

Gen. No. 9316.

Agenda No. 18.

James Barker
Plaintiff-Appellee,

-vs-

George Geisendorfer,
Defendant-Appellant.

Appeal from

Circuit Court

Pike County.

313 I.A. 351² 69

Fulton J:

The record in this case discloses the following facts:

On the 20th day of February, A.D. 1941, one A.B. Lawson, commenced a suit in the Justice of the Peace Court before the Appellant, George Geisendorfer, a Justice of the Peace in Pittsfield, Illinois, against the Appellee, James Barker. The case was set for trial at eight o'clock A.M. on February 27th, 1941. After one or two short continuances, it was again set for hearing at one o'clock P.M., on that same date. At that hour the Appellee appeared with his attorney, David Williams, and moved for a change of venue, presenting in support thereof the affidavit of the Appellee, James Barker, defendant in that cause, stating that he could not have a fair and impartial trial before the Appellant Geisendorfer. The motion for change of venue was denied by Appellant on the ground that the motion was filed too late because a motion for continuance had theretofore been granted to Appellee Barker.

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THE UNIVERSITY OF CHICAGO
 1100 S. EAST
 CHICAGO, ILL. 60607

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Gen. No. 10159.

James Baker
President

-227-

George Washington
Washington

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ENTRÉE 1:

The cause then proceeded to trial and continued into the next day, February 28th. On that date the Justice of the Peace, Appellant here, found in favor of A.B. Lawson, the Plaintiff in that suit, and entered judgment against Appellee for the sum of \$55.00, and costs of suit. Appellee Barker paid the judgment and later started suit against the Appellant Geisendorfer to recover the penalty provided for in Paragraph 36 of the Justice and Constables Act, for refusing change of venue.

On the trial of that case in the Justice Court judgment was rendered in favor of the Appellant George Geisendorfer, and against the Appellee, James Barker, whereupon Barker appealed the case to the Circuit Court of Pike County. The cause was tried in the latter court and resulted in a judgment for the Appellee and against the Appellant, George Geisendorfer, the damages being fixed in the finding of the Court and in the judgment at the sum of \$100.00. It is that judgment which Appellant seeks to reverse by this appeal.

It is the duty of a Justice of the Peace to grant a change of venue where a party to the suit, before the commencement of the trial, makes oath that he cannot have an impartial trial before said Justice of the Peace. Chap. 79. Par. 34, Ill. R.S. 1940, Bar Assn Ed.

A change of venue is a statutory right. People v. Gibbons, 91 Ill. App. 567.

The first of these is the fact that the text of the document is in a language which is not understood by the majority of the population of the country. This is a serious obstacle to the dissemination of the document and to the education of the people. The second is the fact that the document is written in a style which is not suitable for the people. It is too long and too complicated, and it contains many technical terms which are not understood by the people. The third is the fact that the document is written in a language which is not understood by the majority of the population of the country. This is a serious obstacle to the dissemination of the document and to the education of the people. The fourth is the fact that the document is written in a style which is not suitable for the people. It is too long and too complicated, and it contains many technical terms which are not understood by the people. The fifth is the fact that the document is written in a language which is not understood by the majority of the population of the country. This is a serious obstacle to the dissemination of the document and to the education of the people. The sixth is the fact that the document is written in a style which is not suitable for the people. It is too long and too complicated, and it contains many technical terms which are not understood by the people. The seventh is the fact that the document is written in a language which is not understood by the majority of the population of the country. This is a serious obstacle to the dissemination of the document and to the education of the people. The eighth is the fact that the document is written in a style which is not suitable for the people. It is too long and too complicated, and it contains many technical terms which are not understood by the people. The ninth is the fact that the document is written in a language which is not understood by the majority of the population of the country. This is a serious obstacle to the dissemination of the document and to the education of the people. The tenth is the fact that the document is written in a style which is not suitable for the people. It is too long and too complicated, and it contains many technical terms which are not understood by the people.

1939
per [unclear]
2-17-40
"Any justice of the peace or police magistrate who shall refuse a change of venue in any suit or proceeding instituted and then pending before him, upon the proper application being made as provided for in this act, shall forfeit and pay to the person aggrieved, one hundred dollars, to be recovered by action of debt in any court of competent jurisdiction." Par. 36. Chap. 79. Ill. R. S. 1940, State Bar Assn. Ed.

Appellant insists that the motion for change of venue in the Lawson case was filed too late because a continuance had been granted Barker prior to his application for the change. The case of ^Bega v. Martin, 174 Ill. App. 217, is cited as authority but that opinion sets forth an entirely different situation from the record in this case.

The cases cited in support of the principle that a judicial officer is not answerable in a civil suit for any judicial act within his jurisdiction, however erroneous, to a party aggrieved, were all rendered long prior to the adoption of Par. 36 above quoted.

In this case we believe that the application for change of venue in the Lawson case was made by Appellee in apt time; the affidavit in support of the same was in substantial compliance with the Statute; the Appellee was aggrieved by the refusal of Appellant to grant the change of venue complained of and the action of the Appellant in denying such motion was a clear violation of said Paragraph 36.

All of these issues were proven by satisfactory and convincing evidence and the judgment of the Circuit Court is affirmed.

AFFIRMED.

[illegible]

The above stated is the true and correct copy of the original as shown to the undersigned by the person who produced it. The undersigned is a duly sworn and qualified interpreter and is not a party to the proceedings.

attested.

Abstract

STATE OF ILLINOIS
APPELLATE COURT
THIRD DISTRICT

FEBRUARY
October Term, A. D., 1941.

General No. 9303.

Agenda No. 8.

MILDRED RENNIE,)
Plaintiff Appellee,)
-vs-)
LOUIS A. HAUFFE,)
Defendant Appellant.)

63
Appeal from
Circuit Court,
Logan County.
70

313 I.A. 352

RIESS, J.:

Appeal was taken by the defendant, Louis A. Hauffe, from a judgment entered against him and in favor of plaintiff appellee Mildred Rennie in the Circuit Court of Logan County, Illinois. The action sought recovery of damages for personal injuries alleged to have been sustained by the plaintiff appellee while riding as a passenger in an automobile then being driven in a northerly direction on concrete State Highway No. 121 at a point about five miles southeast of Lincoln, Illinois. The above car was proceeding along said highway in the rear of a small pickup truck operated by the defendant Hauffe and being driven by him in the same direction. According to the testimony of the plaintiff, the defendant Hauffe attempted to turn around on the hard road by driving his truck upon the east shoulder of the highway and then to the left across the slab towards the west; that at that time, a third automobile driven by one Bernice Homerin was approaching defendant's truck from the south; that Bernice Homerin, because of the act of the defendant Hauffe, was forced to drive her car with at least two wheels thereof off of the highway on to the wet and slippery west shoulder, and that as a proximate result, she lost

Appellate

STATE OF ILLINOIS
APPELLATE COURT
JANUARY 1935

Appeal from the Circuit Court of Cook County

Appeal No. 10,000

General No. 9900

Appellant
Louis A. Haurer
Respondent
Mildred Ransom

MILDRED RANSOM,
Plaintiff,
vs.
LOUIS A. HAURER,
Defendant.

REPLY, 11.

Appeal was taken by and on behalf of Louis A. Haurer, from
a judgment entered against him and in favor of plaintiff, Mildred
Ransom, in the Circuit Court of Cook County, Illinois. In
action sought recovery of damages for personal injuries alleged to
have been sustained by the plaintiff as a result of being struck
passenger in an automobile being driven by defendant, Louis A. Haurer,
on concrete State Highway No. 181 at a point about five miles southeast
of Lincoln, Illinois. The above set out proceedings took place in the
in the year of a small group of people who were present at the
and being driven by him in the same direction. According to the
testimony of the plaintiff, the defendant failed to stop the car
on the east end of the bridge over the creek and the defendant
highway and then to the left across the field to the west of the
at that time, a small automobile driven by the defendant, Louis A.
approaching defendant's car from the west. The defendant failed to
because of the fact that the defendant failed to stop the car
on the east end of the bridge over the creek and the defendant
highway and then to the left across the field to the west of the

control of her car, causing it to run to the left across the slab into the car in which the plaintiff was riding, resulting in severe injuries to the plaintiff.

The jury returned a verdict for the plaintiff in the sum of seven hundred dollars, and after overruling the motions for a new trial interposed by the defendant, the Court entered judgment on the verdict, from which this appeal is prosecuted.

The cause of action is based on the plaintiff's contention that Louis A. Hauffe, the defendant, suddenly, carelessly and negligently ran and drove his delivery truck across the paved portion of the highway and into the path of the car that was being driven by Bernice Homerin, thereby blocking traffic upon both traffic lanes of said highway, and that as a direct result, Bernice Homerin was forced and compelled to pass around in front of said delivery truck in order to prevent a collision of her automobile, causing her car to skid into the car occupied by the plaintiff and injure her.

The evidence is conflicting on the question of whether or not the Homerin car was forced off of the slab by the defendant in the negligent operation of his truck or whether it left the slab for no apparent reason after it passed his truck. According to the plaintiff's testimony, the car in which she was riding was about one hundred feet to the rear of the truck. She testified that the truck suddenly whirled around on the hard road and that the front end of the truck was very close to her left side of the slab and that it was crosswise on the slab and over the black line; that at that time, the car driven by Bernice Homerin at least partly left the slab to pass around the truck. Bernice Homerin testified that she observed the truck start to make the turn on the highway; that she shifted into second and started to pass him; that at that time the defendant started forward ahead of her and that she was forced to turn out on the shoulder

control of her car, causing it to turn to the right and into the car in which the plaintiff was seated, resulting in the injuries to the plaintiff.

The jury returned a verdict in favor of the plaintiff in the sum of seven hundred dollars, and after overruling the motion for a new trial, entered judgment in the verdict, the court entered judgment in the verdict, from which said appeal is prosecuted.

The case is decided in favor of the plaintiff's contention that Louis A. Heston, the defendant, negligently, carelessly and recklessly ran and drove his car into the plaintiff's car, causing the plaintiff's injuries and into the path of the car then being driven by Bernice Heston, thereby causing the plaintiff's injuries on said highway, and that as a result thereof, the plaintiff was forced and compelled to leave her car in front of the defendant's car in order to prevent a collision of her automobile, causing her to suffer the injuries complained of by the plaintiff and damage her.

The evidence is conflicting on the question of whether or not the Heston car was forced into the plaintiff's car by the defendant's negligent operation of the car or whether it left the car for no apparent reason after it passed the plaintiff's car. According to the plaintiff's testimony, and one in which she states that she saw the plaintiff's car in the path of the Heston car, she testified that the car suddenly swerved around her car and into the plaintiff's car and that the car was very close to her left side at the time and that it was oversteered to the right and into the plaintiff's car at that time, the car driven by Bernice Heston is found to have been forced to leave the road and struck the plaintiff's car and that the plaintiff's car was struck and forced to leave the road and into the plaintiff's car and that the plaintiff's car was forced to leave the road and into the plaintiff's car.

and that as she went out on the shoulder, her car began to skid and swung across the pavement into the automobile occupied by the plaintiff. The witnesses seem to agree that the collision occurred at a point about seventy five to one hundred feet from the truck.

Defendant appellant testified that after he had passed the place where he had intended to stop along the highway, he decided to turn around on the slab and go in the opposite direction; that thereupon he drove off of the slab and made a turn toward the hard road; that he drove to the black line and backed off of the pavement with the front wheels of his car against the edge of the slab and waited until the Homerin car had passed him; that he then turned on to the hard road and followed her; that he saw her car go off the highway on to the shoulder and turn back ~~off~~ the slab and strike the car that had come from the south, which was occupied by the plaintiff.

Whether or not the evidence established the charges of negligence alleged in the complaint became a question of fact for the jury, which was determined adversely to the defendant appellant by its verdict.

The important question presented by the record and argued by counsel is whether the negligence alleged was the proximate cause of the injury to the plaintiff, or whether the collision was not the proximate result of such alleged negligence on the part of the defendant, but was the result of an independent intervening cause, viz: The act of Bernice Homerin in turning back upon the pavement after she had passed in front of the defendant's truck. The rules for determining whether a negligent act or omission is the proximate cause of an injury are well established and have been applied by different courts in numerous cases under differing conditions of fact. The negligent act or omission must be the proximate cause which produces the injury, but it need not be the sole cause nor necessarily the last or nearest cause. It is sufficient if it concurs with some other cause acting at the same time which, in combination with it, causes the injury; or if it sets in

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in motion a chain of circumstances and operates on them in a continuous sequence unbroken by any new or independent cause. It is not necessary that the person guilty of a negligent act or omission might have foreseen the precise form of the injury, but when it occurs, it must appear that it was a material and probable consequence of his negligence. The test in determining the question of a proximate cause is whether the person guilty of the first negligent act or omission might have reasonably anticipated the intervening cause as a natural and probable result of his own negligence and if so, the connection between such negligence and the injury is not broken by the intervening cause.

If there is evidence tending to show that the negligence alleged was a proximate cause of the injury, then the matter is one of fact to be submitted to the jury, but the question whether there is any such evidence is one of law for the Trial Judge to decide. In *Lotesto v. Baker*, 246 Ill. App. 425, a plaintiff based his cause of action on the fact that the defendant swerved his car into the path of a truck and that, as a natural consequence, the driver of the truck swerved his truck to the left, thereby injuring the plaintiff. There, as here, it was argued that the negligence of the driver of the automobile was not the proximate cause of the injury; that the intervening act of the driver of the truck was the sole cause of the injury. The Court said (page 431): "In considering the conduct of the defendant, Henikoff, it will be seen that that conduct was in and of itself, according to the evidence for the plaintiff, the direct source of the swerving of the truck, to the left, out of its normal course and of the consequent collision with the plaintiff. When the automobile intercepted the truck it precipitated, almost immediately, the new motions of the truck, which resulted in the collision. The act of the driver of the truck, considering the situation, was entirely dependent upon the action of the defendant Henikoff. It may be true

that both the driver of the truck and the defendant, Henikoff, were guilty of negligence, but it does not follow that the negligence of the driver of the truck exonerated the defendant Henikoff, for if the plaintiff was injured by the combined negligence of both parties he would have a cause of action against either or both. St. Louis Bridge Co. v. Miller, 138 Ill. 465."

If the defendant's truck was crossways on the highway, as his witness, Bernice Homerin, testified, and if the defendant moved his truck forward as she was passing in front of his truck, he might have reasonably anticipated that his action would cause her to leave the highway and that she might lose control of her automobile on the wet and slippery shoulder, thereby causing damage to her own car or any other cars which might be driving along the highway. Therefore, the jury was justified in finding that the collision was directly traceable to the negligence of the defendant, as alleged in the complaint.

We hold that the Court was warranted in submitting this question of fact to the jury under the evidence, and the jury was, from the facts and circumstances in evidence, warranted in finding that the connection between the conduct of the defendant and the collision was unbroken and that the proximate cause of the injury was the negligence of the defendant.

It is further insisted that the Court erred in refusing six of the defendant's instructions. All propositions of law were fully covered in sixteen instructions given by the Court on behalf of the defendant. The refused instructions are subject to criticism. It is not proper to instruct the jury that certain facts, some of which are not disputed, do or do not constitute negligence, contributory negligence or proximate cause.

Finding no reversible error in the record, the judgment of the Circuit Court of Logan County is affirmed.

JUDGMENT AFFIRMED.

that both the driver of the truck and the defendant, plaintiff, are guilty of negligence, and it does not follow that the negligence of the driver of the truck operated the defendant's truck. It is the plaintiff who is injured by the combined negligence of both parties and would have a cause of action against either or both. See *Miller v. Co. v. Miller*, 100 Ill. 402.

If the defendant's truck was operating on the highway, as his witness, Dennis Herman, testified, and if the defendant covered his truck forward as he was passing in front of his truck, he might have reasonably anticipated that his action would cause him to leave the highway and that she might lose control of her automobile on the wet and slippery road, thereby causing damage to her car or any other cars which might be driving along the highway. Therefore, the jury was justified in finding that the collision was directly traceable to the negligence of the defendant, as alleged in the complaint.

It holds that the Court was warranted in assuming that question of fact as to the jury under the evidence, and that it was from the facts and circumstances as evidenced, warranted in finding that the connection between the actions of the defendant and the collision was not broken and that the negligence of the defendant was the negligence of the defendant.

It is further held that the Court should not have six of the defendant's instructions. The defendant's instructions fully covered the whole question of the defendant's negligence of the defendant. The defendant's instructions were sufficient to show that it is not enough to maintain the jury that the defendant's negligence which was not intended, to cause the negligence of the defendant, but that the defendant's negligence was the negligence of the defendant.

That the defendant's negligence was the negligence of the defendant and that the Court should not have found as alleged.

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LOREN D. SEXAUER and ROBERT A.
NELSON, Successor Trustees of
Exchange Sales Corporation,
Appellants and Cross-Appellees,

v.

TRUST COMPANY OF CHICAGO, as
Successor Trustee, under trust
known as Trust No. 3927,
Appellee and Cross-Appellant.

APPEAL FROM

CIRCUIT COURT,

COOK COUNTY.

313 I.A. 352²

MR. PRESIDING JUSTICE MCSURELY DELIVERED THE OPINION OF THE COURT.

This is an action for an accounting. The principal item in controversy is the claim of Carroll Schendorf & Boenicke, Inc., a real estate agency, for compensation for services and expenses in connection with securing purchasers of apartments in a large cooperative apartment building.

Carroll Schendorf & Boenicke, Inc., operated under that name until June 24, 1931, when its name was changed to Exchange Sales Corporation. Subsequently it made an assignment for the benefit of creditors and the plaintiffs are successor trustees under that assignment.

In 1927 James Carroll, Winfield Schendorf and Meyer Fridstein, as individuals, associated themselves together to build a 98 cooperative apartment building at 5000 East End avenue, Chicago; Carroll and Schendorf were officers of Carroll Schendorf & Boenicke, Inc.; Fridstein was associated with a firm of contractors who built the building. Carroll, Schendorf and Fridstein borrowed money to purchase the land on which the building was to be erected and organized a corporation known as 5000 East End Avenue Building Corporation; 10,000 shares of stock were distributed equally among the three persons in consideration of the transfer to the corporation of the land upon which the building was to be erected. A building loan of \$1,600,000 was negoti-

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ated with S. W. Straus & Company. Each apartment had allotted to it a certain number of shares of stock which were to be delivered to the purchaser, together with a proprietary lease when the stock was paid for in full.

January 10, 1928, Fridstein, Carroll and Schendorf, who were operating as a co-partnership with reference to the building, and Carroll Schendorf & Boenicke, Inc., (hereafter called "Boenicke, Inc.") entered into a contract under which the latter was employed as selling agent of apartments and stock of the building corporation, for compensation and terms which were stated in the contract. Boenicke, Inc. was authorized to make leases and had sole and exclusive agency for this purpose, - the agreement to remain in full force and effect until all of the stock was sold or apartments leased. The contract also provided that all its terms and obligations should be binding upon the administrators and assigns of the parties thereto.

When the shares of stock of the building corporation were issued they were deposited in escrow with the Chicago Title & Trust Company, with the proceeds of the sale of the stock. The agreement of January 10, 1928, directed the Chicago Title & Trust Company to pay Boenicke, Inc., its charges out of the first moneys received.

October 1, 1928, the co-partnership of Carroll, Schendorf and Fridstein, who were constructing the building, became involved in financial difficulties, not having sufficient funds to pay the various persons to whom they were indebted for money, materials, etc., including Boenicke, Inc., to whom they were indebted in a substantial amount. On this date a meeting was called of the creditors of this co-partnership at which the situation was discussed for the purpose of finding a method to complete the build-

ing and satisfy the creditors. Three attorneys, representing different creditors, were appointed a committee to investigate the situation and formulate a plan of liquidation.

A trust indenture was prepared which was dated December 15, 1928, but was not actually signed by all of the parties until some weeks thereafter. Under this agreement Carroll, Schendorf and Fridstein conveyed to the Foreman Trust & Savings Bank and Morris E. Feiwell, as trustees, certain assets, including the capital stock of the building corporation and proprietary leases and all other interests in moneys, contracts or assets received in exchange for stock previously sold. It also provided that the creditors should receive in exchange for an assignment of their claims to the trustees, debentures of four different classes: A, B, C, and D, - to have priority in the order mentioned. Boenicke, Inc., received class D debentures in the aggregate amount of \$66,763.52. The master to whom the cause was referred found that this amount covered claims due Boenicke, Inc., up to October 1, 1928. The chancellor overruled the master in this respect, finding that the debentures were payments in full to December 15, 1928.

Subsequently the Foreman Trust & Savings Bank ceased to act as trustee, and the American National Bank & Trust Company became a successor trustee. Later the American National Bank and Feiwell resigned as trustees, and the Trust Company of Chicago, representing Carroll, Schendorf and Fridstein (hereafter called defendants), was appointed successor trustee.

Boenicke, Inc., continued to sell apartments in the building after October 1, 1928, advancing various sums for advertising and other expenses until February 15, 1929. The master held that the agreement of January 10, 1928, employing Boenicke, Inc., as exclusive selling agents of the stock and apartments

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in the building, was binding upon the defendants, who had knowledge at all times from October 1, 1928, that Boenicke, Inc., was engaged actively in the sale of leases; that the contract of January 10 was in no way disaffirmed on December 15, 1928 by the trustees for the benefit of creditors, and that defendants became liable to compensate their selling agent for its services between October 1, 1928 and February 15, 1929, in accordance with the terms of the contract of January 10, 1928. The chancellor found that while defendants were liable for sales made and moneys advanced after December 15, they were not liable for sales made and moneys advanced between October 1 and December 15, because in his opinion the agreement bearing date of December 15 was by its terms a bar to any claims prior to that date.

There is some conflict in the testimony as to what was said and done at the meeting of October 1, 1928. Mr. Altheimer, the attorney for defendants, stated that Boenicke, Inc., had through its agency handled the building from its inception, and he recommended that it be retained to continue the sale of the apartments, and Carroll testified it was agreed by the others that this agency was most competent and should continue the job of selling the apartments and finishing what had been started. Carroll further testified that terms were discussed and it was agreed that this agency would handle the sale of apartments on the same terms as before; that the terms of the contract of January 10, 1928, were discussed and subsequently this contract was handed to Mr. Blumberg, attorney for one of the creditors, who was drawing the trust agreement. The testimony of the attorneys for the creditors, who were witnesses produced on behalf of defendants was somewhat in conflict with that given by Mr. Carroll. Maurice Berkson, one of these attorneys testifying, did not recall that management was discussed, although Mr. Altheimer, the at-

torney for Boenicke, Inc., had said this agency would keep the matter going.

The master saw and heard the witnesses and was in the best position to judge of the weight of their testimony. There are many cases holding that the findings of a master are entitled to consideration, and in Meyer v. Levy, 249 Ill. App. 408, it is said that "a court of review should be slow in disturbing the conclusions of the master upon the facts, unless it can be said that the master's conclusions were clearly contrary to the probative force of the evidence." The master found that Boenicke, Inc. continued to sell apartments under the contract of January 10, 1928 during the period between October 1, 1928 and February 15, 1929; that the defendants knew this and did not disaffirm the contract of January 10, which was by its terms made binding on the assignees.

The brief for Boenicke, Inc. persuasively argues that if it is successful it will only mean that it is paid for services actually rendered and moneys advanced, while if defendants are successful it will mean they will have obtained services and benefits without paying for the same.

The agreement of December 15, 1928 is not a bar to Boenicke, Inc. recovery of moneys earned between October 1 and that date. In the pleadings filed by defendants there is no claim that this document of December 15 is a bar. The first time this appears is in the objection to the master's report.

It should be borne in mind that at the meeting of October 1 the terms of the proposed trust were agreed upon and that Mr. Blumberg was appointed to draw up the trust agreement. This took several weeks, and it is in evidence that some of the parties did not sign it until some time after the date which it bore. Under such circumstances the actual dating of the document cannot be considered important as fixing the amounts due. The claims of

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all the contractors were already fixed on October 1, 1928, and the amount of debentures they were to receive was already fixed on that date.

Examination of the trust agreement of December 15, 1928 does not support defendants' claim that by its terms it bars any claims of Boenicke, Inc. beyond October 1, 1928. The agreement contains the provision that Carroll, Schendorf and Fridstein warrant and represent that they have full, true and lawful right to make the assignment above set forth; that the claims set forth in Exhibits A, B, C and D, "are the only liens, claims, demands and obligations arising out of the purchase of said land and the construction of said building, unpaid at the date hereof." This is not a representation by Boenicke, Inc. but by the partnership of Carroll, Schendorf and Fridstein. Moreover, it represents that the partnership had only claims, etc., "arising out of the purchase of said land and the construction of said building." Boenicke, Inc., made no claims of obligations arising out of the purchase of the land and construction of the building, but claim payment for services in procuring tenants for the building. We find nothing in this agreement contrary to the claim of Boenicke, Inc. that it was entitled to compensation from October 1 to December 15, 1928. Other considerations support our conclusion that the trial court was in error in sustaining objections to the master's report in this respect.

February 15, 1929, Boenicke, Inc., entered into an agreement with the trustees named in the instrument of December 15, 1928, whereby the former was employed as exclusive agent to conduct the sale of leases, receiving a commission in accordance with the Chicago Real Estate Board rates, and compensation for the sale of stock and proprietary apartment leases in accordance

All the contracts were all right on October 1, 1938, the amount of \$60,000.00 they were to receive was all right on that date.

Examination of the trust agreement of a contract, 1938, does not support statements, claim that it was it was all right of Boenike, Inc., beyond October 1, 1938, the agreement contains the provision that Carroll, Incorporated, as trustee, warrant and represent that they have full, true and lawful right to make the assignment above set forth; that the claim set forth in Exhibit A, B, C, and D, "are the only claims, claims, demands and obligations arising out of the purchase of said land and the construction of said building, unless it be the fact that this is not a representation by Boenike, Inc., but by the partnership of Carroll, Incorporated, and Boenike, Inc., as partners, it represents that the partnership had only claims, etc., "arising out of the purchase of said land and the construction of said building."

Boenike, Inc., made no claim of said land and the purchase of the land and construction of the building, but claim payment for services in preparing the plan of the building. We find nothing in this contract contrary to the claim of Boenike, Inc., that it was entitled to receive from October 1 to December 15, 1938, after construction was completed, that the trial court was in error in its decision of claims to the estate of Boenike, Inc., in this respect.

February 22, 1939, Boenike, Inc., advised that the agreement with the trustee named in the trust of October 1, 1938, whereby the trust was to receive a certificate of title to the land of Boenike, Inc., in consideration of the payment of the price of the land, with the claim, all claims, demands, and obligations for the use of said land and building, Boenike, Inc., in the name

with schedule "A" attached to the agreement. This agreement also provided that the agency was to pay all expenses in connection with the sale of the stock and to pay for advertising at the rate of not less than \$500 a month; also to receive as additional commission a sum equal to 1 per cent of the selling price of each unit. Boenicke, Inc. proceeded to sell various units of stock and proprietary leases and advanced various sums for advertising purposes, and continued these services during the latter part of 1928, and also the years 1929 and 1930. The master found that for such services it became entitled to receive commissions, less credits, of a balance of \$7,446; that it executed sub-leases and became entitled to receive commissions, and found that it was entitled to these amounts with interest at the rate of 5 per cent per annum from June 1, 1930. Boenicke, Inc. was entitled to compensation for services on apartments sold between December 15, 1928 and February 13, 1929, under the provisions of the contract of January 10, 1928.

The master found, and the trial court approved, that Boenicke, Inc. could not recover for moneys advanced on assumed leases, because of a provision in the contract of January 10, 1928 that all expenses incidental to sale were to be assumed by it. We agree with the conclusion that such moneys advanced were part of the expenses incidental to the sale of the premises and under this contract were assumed by it.

The master and court found that Boenicke, Inc. was not entitled to credit for \$1,426.10 for "miscellaneous expenses," because of insufficient proof and also the contract of January 10, 1928, providing that such expenses shall be borne by the selling agent. We also concur in this conclusion.

The decree found that after December 15, 1928, and prior to February 15, 1929, Boenicke, Inc. sold certain apartments in

the East End avenue building and expended moneys for advertising; that on February 13 it had in its possession \$16,864.09 belonging to the trustees. The decree credited it with commissions and advertising expenditures aggregating \$9,843.72, leaving a balance due from it of money belonging to the trustees of \$7,020.37. Boenicke, Inc. argues that defendant successor trustee was not entitled to this credit, as the claim is barred by the statute of limitations. Defendants are not seeking any recovery against plaintiff in this respect. They are simply asserting that they are entitled to a credit to plaintiff's claim, and the trial court correctly found that the selling agent was overpaid in the amount of \$7,020.37.

The master allowed interest to plaintiff, but the court overruled the master in this respect. We are of the opinion that under section 2 of the Interest statute plaintiff is entitled to interest on all commissions on sales made after October 1, 1928, and on lease renewals and on moneys paid for advertising from the date such commissions became due, at 5 per cent per annum, to the date of the decree to be entered herein under the remanding order.

We think the chancellor properly taxed the costs between the parties.

The briefs of both parties exhibit a high degree of forensic ability and skill. But in the intensity of mutual combat, the principal purpose of a brief - to enlighten the court - has been somewhat forgotten.

The decree is affirmed in part and reversed in part, and the cause is remanded with directions to state the account consistent with what we have held in this opinion.

AFFIRMED IN PART, REVERSED IN PART AND
REMANDED WITH DIRECTIONS

Matchett, and O'Connor, JJ., concur.

41717)
41718) Consolidated cases.

ROSE F. GILBERT,
Appellee,

v.

JOSEPH ROSENBERG and
HARRY ZISOOK,
Appellants.

APPEAL FROM MUNICIPAL
COURT OF CHICAGO.

313 I.A. 353

MR. JUSTICE FRIEND DELIVERED THE OPINION OF THE COURT.

Plaintiff brought two suits in the Municipal court against defendants as guarantors of the payment of principal and interest of \$3,500 face value of mortgage bonds owned and held by her. (Municipal court cases Nos. 2780871 and 2780872.) The causes were consolidated for trial and heard by the court without a jury on Pleadings and Admission of Facts under par. 259.18, subpar. (2) of the Civil Practice Act (ch. 110, Ill. Rev. Stat. 1941). The court denied effect to a plea of res judicata arising from an order or decree of the United States District Court in reorganization proceedings under sec. 77-B of the Bankruptcy Act, and entered judgments against defendants aggregating \$6,000, from which they have taken an appeal.

From the pleadings and uncontroverted facts it appears that plaintiff was the owner and holder of matured mortgage bonds executed by Joseph R. Loewenstein, in the aggregate principal amount of \$3,500, of which \$1,500 of face value, dated December 1, 1927, were a portion of an issue of \$325,000, secured by a mortgage trust deed conveying real property in Chicago, known as 5711-17 Kenwood Avenue Apartments, and \$2,000 of face value, dated February 19, 1926, were a portion of an issue of \$265,000, secured by a mortgage trust deed conveying

real estate in Chicago, known as the North-Mason Building. Defendants by written instruments, executed at the time of issuance of the bonds, guaranteed their payment, with interest.

October 17, 1934, Ruskin Hall Building Corporation was the owner of both of these properties, as well as other real estate in Chicago known as the Blackstone Court and Mansfield Block. On that date it filed its petition for reorganization under sec. 77-B of the Bankruptcy Act in the District Court of the United States, and November 16, 1934, the petition was duly approved by the court as having been properly filed.

January 14, 1935, plaintiff obtained leave of the District Court to enter her appearance and to intervene in the reorganization proceedings. Shortly thereafter she moved the District Court for appointment of a temporary trustee for the debtor's assets, for an accounting, and for other relief. February 18, 1935, she filed her proofs of debt in the reorganization proceeding, based upon the \$3,500 of mortgage bonds owned and held by her, which were accompanied by her written and signed instrument stating that "I do not consent to plan of reorganization set forth by debtor."

January 14, 1935, the debtor, Ruskin Hall Building Corporation, filed separate plans of reorganization for the Ruskin Hall Building and the North-Mason Building, each of which provided for the organization of a separate corporation to which the two buildings were respectively to be conveyed, the issuance of stock of the new corporations to the bondholders, and the release of all claims against the makers and guarantors of the mortgage bonds. Similar plans of reorganization were filed with respect to the other properties of the debtor. Twenty bondholders filed written objections to the plan for the Ruskin Hall Building,

real estate in Chicago, known as the "Chicago Building", existing at the time of the filing of the petition, and the issuance of the bonds, and the filing of the petition on October 14, 1934, which will include the petition and the owner of both of these properties, as well as other real estate in Chicago known as the "Jackson Court and Marshall Block", in that date it filed its petition for reorganization under sec. 77-B of the Bankruptcy Act in the District Court of the United States, and November 15, 1934, the petition was duly approved by the court as having been properly filed.

January 14, 1935, the court obtained leave of the District Court to enter her appearance and to intervene in the reorganization proceedings. Shortly thereafter she moved the District Court for appointment of a temporary trustee for the debtor's assets, for an accounting, and for other relief. February 18, 1935, she filed her motion of leave in the reorganization proceedings, based upon the \$2,500 of mortgage bonds owned and held by her, which were accompanied by her written and signed statement stating that "I do not consent to plan of reorganization set forth by debtor."

January 14, 1935, the debtor, which will include her petition, filed a petition of reorganization in the District Court of the United States, which will include the petition and the issuance of the bonds, and the filing of the petition on October 14, 1934, which will include the petition and the owner of both of these properties, as well as other real estate in Chicago known as the "Jackson Court and Marshall Block", in that date it filed its petition for reorganization under sec. 77-B of the Bankruptcy Act in the District Court of the United States, and November 15, 1934, the petition was duly approved by the court as having been properly filed.

and thirteen bondholders to the North Mason Building plan. Numerous other bondholders filed objections to the plans respecting the other properties. Among the objectors, eight opposed on general grounds the release of the guarantors, while four, among them one holder of bonds on the Ruskin Hall Building and two holders of bonds on the North Mason Building, specifically contested the jurisdiction of the United States District Court, in proceedings for corporate reorganization, to confirm plans providing for the release of the guarantors.

March 12, 1935, the plans of reorganization, together with the consents and objections thereto and proposed modifications thereof, were referred for hearing to Charles A. McDonald, a master in chancery of the District Court, with directions to take proofs, make findings of fact and conclusions of law thereon, and report same to the District Court. The master held hearings on six separate days in March and April, 1935. Plaintiff, Rose F. Gilbert, attended three of these hearings, at which she cross-examined witnesses and otherwise participated in the proceedings.

At the hearing April 3, 1935, in the presence of plaintiff, David H. Kraft, representing a bondholder of the Ruskin Hall Building, argued against the jurisdiction of the court to release the guarantors. Plaintiff did not appear at the three subsequent hearings at which Kraft continued with his argument and at which Benjamin H. Washer, representing a bondholder of the Blackstone Court Apartments, likewise argued against the power of the court to release the guarantors from their obligations. Washer also filed extensive written suggestions opposing the plan on various grounds, including the contention that the court lacked jurisdiction. At one of the hearings in April, Joseph W. Cox, representing a bondholder of the Ruskin Hall Building, obtained leave of the master to adopt Washer's

argument and suggestions, and to apply them to the Ruskin Hall Building plan. Plaintiff was present at the last hearing on April 22, 1935, at which the master said that the questions before him were whether the plan of reorganization was fair and equitable and for the best interests of all the bondholders, and whether defendants should be released from their guaranty. He specifically inquired of the bondholders present whether any of them wished to ask any further questions, and plaintiff participated in the ensuing discussion. Washer then said that he represented a dissenting bondholder who was vigorously opposing the plan, "But I do want to state, for the benefit of all the bondholders, that I believe that we have got enough evidence in the record now to make all our objections; that the Master has permitted every proper question to be answered. *** I believe that we have a complete record here."

The master filed his report June 6, 1935, recommending that all objections filed to the respective plans of reorganization be overruled, except objections relating to the number of directors of the new corporations, the manner of choosing these directors, and the subordination of the debtor's interest in the new corporations; and that the plans of reorganization be approved by the court in their entirety, with the exception of amendments pertaining to those features alone.

June 21, 1935, after due notice to all parties, including plaintiff's attorneys of record, the court entered its decree approving the report of the master, confirming and approving the plans of reorganization, decreeing the bonds and coupons "to be cancelled and of no further legal effect whatsoever, all obligation thereon being from this date extinguished and discharged, and that said bonds and coupons shall only remain in effect as a medium of exchange for the new securities as provided in said respective plans of reorganization as modified," and ordering the release

of the trust deeds securing the bonds.

Subsequently, November 18, 1935, the District Court entered a decree finding that all things required to be done by the debtor in the consummation of its plans of reorganization had been carried out or provided for, and closing the reorganization proceedings.

The holders of over 95 per cent of the bonds on each of the two properties here in question have exchanged them for new securities provided for them under the plans of reorganization. Plaintiff, however, did not accept the plans of reorganization nor the securities available to her thereunder, but instituted the two suits in the Municipal court against the guarantors to recover the face value of the principal of her bonds and interest thereon. No order or decree in the reorganization proceedings has ever been appealed from or in any manner stayed, reversed or modified.

The defense interposed that the decree of the United States District Court is res judicata and constitutes a bar to the consolidated causes, is predicated largely on defendant's participation in the reorganization proceedings, where she intervened, pursuant to leave, entered her appearance, filed claims, moved for appointment of a trustee and other relief, dissented from the plans of reorganization, participated in hearings and examined witnesses, while other creditors of the same class pleaded and urged objections, with full opportunity to her to join therein, to the effect that the court lacked jurisdiction to confirm plans of corporate reorganization having the effect of discharging the obligations of the individual guarantors.

We have heretofore had occasion to pass upon and deny the right of dissenting creditors to pursue in state courts, against the original makers and guarantors of mortgage bonds

Специально, November 13, 1935, at the same place

entirely a false finding that all of them were to be found

The holders of over 99 per cent of the shares on each of

The defense interposed that the 1 or 2 "hit" listed

1. The first of these is the fact that the majority of the population of the United States is of European descent, and the majority of the population of the United Kingdom is of European descent.

[illegible]

secured by the corporate debtor's property, remedies inconsistent with prior decrees of reorganization entered by the District Court under sec. 77-B of the Bankruptcy Act. In Barnett v. Gitlitz, 290 Ill. App. 212, a decree of reorganization had been entered in the United States District Court which provided for the satisfaction in full of a foreclosure decree, the release of the trust deed which had been the subject matter of foreclosure and the cancellation and exchange of the bonds secured by the trust deed for stock of the debtor corporation. Thereafter plaintiff had judgment on two of the bonds in the Municipal court against five individual makers. On appeal the cause was remanded with directions to cause a satisfaction of the judgment to be entered in the Municipal court on the ground that "full force and effect" should be given to the laws of the United States and the orders and decree of the United States District Court. Subsequently in Osborn v. Thorn, 298 Ill. App. 261, a decree for reorganization of property under sec. 77-B of the Bankruptcy Act had provided that the bonds secured by the first mortgage trust deed be cancelled and of no effect, except as a medium of exchange. Following this decree, plaintiff had judgment in the Superior court against two principal makers of mortgage bonds. It was held on appeal that the District Court having jurisdiction of the subject matter, "if an interested party is not satisfied with the decision of the United States District Court, his privilege is to appeal therefrom if he so desires and not attempt to present the question for decision in a court other than a court of review."

Preceding these two decisions an opinion was filed (April 5, 1937) in Gottlieb v. Crowe and Stoll, 289 Ill. App. 595, the circumstances of which were strikingly similar to the case at bar. In that proceeding Gottlieb brought suit in the Municipal court and had judgment against defendants as guarantors of

secured by the corporate property, and the corporation
tent with prior claims of record in the public
Court under sec. 77-3 of the Bankruptcy Act, in Bankruptcy
District, 290 Ill. App. 212, a decree of reorganization had
been entered in the United States District Court which provided
for the satisfaction in full of a mortgage secured, and the
lease of the trust deed which had been the subject matter of
foreclosure and the cancellation and exchange of the bonds
secured by the trust deed for stock of the debtor corporation.
Thereafter plaintiff had judgment on two of the claims in the
Municipal court against five individual debtors, on appeal the
cause was remanded with directions to cause a satisfaction of
the judgment to be entered in the Municipal court on the ground
that "full force and effect" should be given to the laws of the
United States and the orders and decrees of the United States
District Court, subsequently in Gordon v. Gordon, 290 Ill. 20,
201, a decree for reorganization of property and sec. 77-3
of the Bankruptcy Act had provided that the bonds secured by
the first mortgage trust deed be cancelled and of no effect,
except as a medium of exchange, following this decree, plaintiff
had judgment in the Municipal court against two individual
debtors of mortgage bonds. The case held on appeal in the District
Court having jurisdiction of the mortgage bonds, the same result
party is not affected with the decision of the Municipal court.
District Court, the result is so equal to the result in the
decree and not subject to the same result in the Municipal court
a court other than a court of review."

Presenting these two questions in opinion was a bill of particulars
in Gordon v. Gordon and Gordon v. Gordon, 290 Ill. 20, 201, the
circumstances of which were stipulated in the bill of particulars.
In that proceeding plaintiff sought to enforce the judgment in the
court and the judgment against the individual debtors.

principal and interest of \$1,500 face value of mortgage bonds owned by him. The United States District Court had previously entered a decree for reorganization of the mortgaged property under sec. 77-B of the Bankruptcy Act, on which Gottlieb's bonds were issued. That decree provided for the cancellation and surrender of the personal guaranties of Stoll and Crowe. Creditors of the same class as Gottlieb had filed written objections to the cancellation of the guaranty and moved that the confirmation of the plan, as approved by the District Court, be vacated. The objections were referred to a master, who recommended that they be overruled, and the court followed the master's recommendation. Gottlieb did not appear in the reorganization proceedings, but during the pendency of the suit in the Municipal court he filed his verified petition in the District court, setting forth ownership of his bonds, stating that he had not approved or accepted the plan of reorganization theretofore confirmed by the court, averring that the District Court did not have the power to cancel the written guaranty and asking that the court vacate or modify the decree to that extent. The debtor's verified answer to Gottlieb's petition apprised the court of the various steps taken in the reorganization proceeding and of plaintiff's receipt of notices of the hearings in the District Court. Upon consideration of the petition and answer, the court again refused to modify the decree approving the plan of reorganization. In the Municipal court Gottlieb contended that the District Court was without authority to cancel the guaranty and, therefore, the decree of that court was not res judicata. When the case was being tried in the Municipal court, the power or authority of the District Court to cancel individual guaranties on bonds in reorganization proceedings had not been determined by any appellate tribunal, but during the interim between the disposition of the case in the Municipal court and the filing

of the opinion in Gottlieb v. Crowe and Stoll, the Circuit court of Appeals, Seventh Circuit, held that in corporate reorganization proceedings a guarantor of the debtor's bonds could not, as against holders of old bonds not consenting to the reorganization plan, be released from such guaranty in consideration of his guaranty of a new bond issue pursuant to a plan of reorganization under sec. 77-B of the Bankruptcy Act. (In re Diversey Building Corporation, 86 Fed. Rep. (2nd) 456, opinion filed November 6, 1936.) Petition for a writ of certiorari to review the decision of the Circuit court of Appeals was denied by the Supreme court of the United States (February 15, 1937) in Diversey Building Corporation v. Weber et al., 300 U. S. 662. In reaching its conclusion in Gottlieb v. Crowe and Stoll, the Appellate court was conversant with the ruling in the Diversey Building Corporation case. Nevertheless, it was held that since that very question had twice been squarely put in issue in the District Court and determined adversely to Gottlieb's contention, the decree of the Federal court was res judicata in the later proceeding in the Municipal court brought to enforce the payment of the guaranty on Gottlieb's bonds.

Thereafter Gottlieb had leave to appeal to the Supreme Court of Illinois, which reversed the Appellate Court and held (Gottlieb v. Crowe, 368 Ill. 88) that the District Court was without jurisdiction to cancel the individual guaranty in a reorganization proceeding and that the question could be raised in a collateral proceeding against the guarantors on the bonds because it affected the jurisdiction of the District Court as to the subject matter involved. The Supreme Court recognized the inherent power of courts to determine the existence or non-existence of jurisdictional facts as an essential attribute of the functioning of every court, but said that no court can

of the opinion in Gottlieb v. Crowe, 300 U.S. 305, 308, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

expand its statutory or constitutional powers by a recital that it has jurisdiction of a subject matter which, in law, ^{it} does not have.

Thereafter the Supreme Court of the United States allowed certiorari to review the judgment of the Supreme Court of Illinois, which had denied effect to the plea of res judicata interposed by defendant, and in Stoll v. Gottlieb (opinion filed Nov 21, 1938), 305 U. S. 165, reversed the judgment of the Supreme Court of Illinois. Its inquiry was directed solely to the validity of the defense of res judicata, as made in the Municipal court proceeding. With respect to the conclusiveness of the order of the District Court releasing the guarantor from the obligation of his guaranty, it was said that although courts do not have the power, by judicial fiat, to extend their jurisdiction over matters beyond the scope of the authority granted them by their creditors, "There must be admitted, however, a power to interpret the language of the jurisdictional instrument and its application to an issue before the court. Where adversary parties appear, a court must have the power to determine whether or not it has jurisdiction of the person of a litigant, or whether its geographical jurisdiction covers the place of the occurrence under consideration. Every court in rendering a judgment, tacitly, if not expressly, determines its jurisdiction over the parties and the subject matter. An erroneous affirmative conclusion as to the jurisdiction does not in any proper sense enlarge the jurisdiction of the court until passed upon by the court of last resort, and even then the jurisdiction becomes enlarged only from the necessity of having a judicial determination of the jurisdiction over the subject matter. When an erroneous judgment, whether from the court of first instance or from the court of final resort, is pleaded in another court or another jurisdiction the question is whether the former judgment is res

judicata. After a federal court has decided the question of the jurisdiction over the parties as a contested issue, the court in which the plea of res judicata is made has not the power to inquire again into that jurisdictional fact." In reaching that conclusion the United States Supreme Court necessarily assumed that the District Court did not have jurisdiction of the subject matter of its order, namely, the release, in reorganization, of an individual guarantor, because the opinion of the Circuit Court of Appeals in In re Diversey Building Corporation had previously been filed and certiorari denied by the Supreme Court of the United States. The decision was based on the fact that in an actual controversy the question of the jurisdiction over the subject matter was raised and determined adversely to the defendant Stoll and that that determination was res judicata of the issue, whether or not power to deal with the particular subject matter was "strictly or quasi-jurisdictional." The facts in the Gottlieb case are closely analogous to those in the case at bar, the principal point of distinction being that in this proceeding plaintiff did not herself urge objections to the United States District Court's jurisdiction to cancel the guaranties, although she had full opportunity to join with other bondholders of the same class who did so; whereas Gottlieb, during the pendency of his suit against the guarantors in the Municipal court, had unsuccessfully petitioned the District Court to vacate or modify its decree of confirmation so as to eliminate the cancellation of the guaranty, upon the ground that it lacked the power to confirm such a plan in the first instance.

Plaintiff's counsel say that the question of the jurisdiction of the District Court to release the guarantors was not raised in an actual controversy before the District Court between the plaintiff and the defendants as to the defendants' liability as guarantors. They argue that the record of the reorganization pro-

ceedings introduced in evidence in this cause does not show that plaintiff as a bondholder had raised the question of jurisdiction or that she had participated with other creditors who had raised the issue, either before the master or the court, and that the record does not show that the District Court passed upon that question or made any finding with respect thereto as to Mrs. Gilbert. The Municipal court adopted plaintiff's position and expressed the opinion that the question of jurisdiction was not raised. It is true that plaintiff did not specifically challenge the court's jurisdiction to release the guarantors, but she had filed her dissent from the plan and remained silent while numerous other bondholders argued that the court lacked jurisdiction to cancel the guaranties. Moreover, the master said that one of the questions before him was whether the individual guarantors should be released, and his report recommended the overruling of all objections and the approval of the release of the guarantors. Thereafter, the court, after due notice to all parties including plaintiff, entered its order approving and confirming the master's report and decreeing the adoption of the plan of reorganization. It thus appears that the jurisdictional issue was pleaded in the form of numerous objections, stated as an issue by the master, argued as a proposition of law, and that objections of other bondholders, challenging the jurisdiction of the court, were overruled and the plans of reorganization confirmed. Plaintiff had full opportunity to join in the jurisdictional issue which was necessarily involved in the proceeding and was concluded by the judgment therein. The precise question was under consideration in Chicot County Drainage District v. Baxter State Bank, 308 U. S. 371, wherein, following Stoll v. Gottlieb, 305 U. S. 165, the Supreme Court of the United States was called upon to determine whether the rule of immunity from collateral

conceding introduced in evidence in this case that the plaintiff is a "bondholder" and that the question of his status or that she had participated with other creditors in the issue, either before the master or the court, and that the record does not show that the plaintiff's status as a creditor was in any way established by the court or made any finding with respect to his status. The Municipal court also found that the plaintiff was not a creditor and that the question of his status was not raised. It is true that plaintiff did not specifically challenge the court's jurisdiction to release the guarantors, but she did not dissent from the plan and remained silent while numerous other bondholders argued that the court lacked jurisdiction to grant the guaranties. Moreover, the master said that one of the questions before him was whether the individual guarantors should be released and his report recommended the overruling of all objections and the approval of the release of the guarantors. Thereafter, the court after due notice to all parties including plaintiff, entered an order approving the continuing the master's report and overruling the objection of the firm of respondent. It then appears that the jurisdictional issue was raised in the course of numerous objections, stated as an issue by the master, and in a provision of law, and that objections of other bondholders, challenging the jurisdiction of the court, were overruled in the course of proceedings confirmed. Plaintiff had full opportunity to join in the jurisdictional issue which was necessarily involved in this case and was included by the plaintiff therein. The jurisdictional issue was under consideration in *Woods v. Woods*, 308 U.S. 101, 102, 103, 104, 105, 106, 107, 108, 109, 110, 111, 112, 113, 114, 115, 116, 117, 118, 119, 120, 121, 122, 123, 124, 125, 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 176, 177, 178, 179, 180, 181, 182, 183, 184, 185, 186, 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 197, 198, 199, 200, 201, 202, 203, 204, 205, 206, 207, 208, 209, 210, 211, 212, 213, 214, 215, 216, 217, 218, 219, 220, 221, 222, 223, 224, 225, 226, 227, 228, 229, 230, 231, 232, 233, 234, 235, 236, 237, 238, 239, 240, 241, 242, 243, 244, 245, 246, 247, 248, 249, 250, 251, 252, 253, 254, 255, 256, 257, 258, 259, 260, 261, 262, 263, 264, 265, 266, 267, 268, 269, 270, 271, 272, 273, 274, 275, 276, 277, 278, 279, 280, 281, 282, 283, 284, 285, 286, 287, 288, 289, 290, 291, 292, 293, 294, 295, 296, 297, 298, 299, 300, 301, 302, 303, 304, 305, 306, 307, 308, 309, 310, 311, 312, 313, 314, 315, 316, 317, 318, 319, 320, 321, 322, 323, 324, 325, 326, 327, 328, 329, 330, 331, 332, 333, 334, 335, 336, 337, 338, 339, 340, 341, 342, 343, 344, 345, 346, 347, 348, 349, 350, 351, 352, 353, 354, 355, 356, 357, 358, 359, 360, 361, 362, 363, 364, 365, 366, 367, 368, 369, 370, 371, 372, 373, 374, 375, 376, 377, 378, 379, 380, 381, 382, 383, 384, 385, 386, 387, 388, 389, 390, 391, 392, 393, 394, 395, 396, 397, 398, 399, 400, 401, 402, 403, 404, 405, 406, 407, 408, 409, 410, 411, 412, 413, 414, 415, 416, 417, 418, 419, 420, 421, 422, 423, 424, 425, 426, 427, 428, 429, 430, 431, 432, 433, 434, 435, 436, 437, 438, 439, 440, 441, 442, 443, 444, 445, 446, 447, 448, 449, 450, 451, 452, 453, 454, 455, 456, 457, 458, 459, 460, 461, 462, 463, 464, 465, 466, 467, 468, 469, 470, 471, 472, 473, 474, 475, 476, 477, 478, 479, 480, 481, 482, 483, 484, 485, 486, 487, 488, 489, 490, 491, 492, 493, 494, 495, 496, 497, 498, 499, 500, 501, 502, 503, 504, 505, 506, 507, 508, 509, 510, 511, 512, 513, 514, 515, 516, 517, 518, 519, 520, 521, 522, 523, 524, 525, 526, 527, 528, 529, 530, 531, 532, 533, 534, 535, 536, 537, 538, 539, 540, 541, 542, 543, 544, 545, 546, 547, 548, 549, 550, 551, 552, 553, 554, 555, 556, 557, 558, 559, 560, 561, 562, 563, 564, 565, 566, 567, 568, 569, 570, 571, 572, 573, 574, 575, 576, 577, 578, 579, 580, 581, 582, 583, 584, 585, 586, 587, 588, 589, 590, 591, 592, 593, 594, 595, 596, 597, 598, 599, 600, 601, 602, 603, 604, 605, 606, 607, 608, 609, 610, 611, 612, 613, 614, 615, 616, 617, 618, 619, 620, 621, 622, 623, 624, 625, 626, 627, 628, 629, 630, 631, 632, 633, 634, 635, 636, 637, 638, 639, 640, 641, 642, 643, 644, 645, 646, 647, 648, 649, 650, 651, 652, 653, 654, 655, 656, 657, 658, 659, 660, 661, 662, 663, 664, 665, 666, 667, 668, 669, 670, 671, 672, 673, 674, 675, 676, 677, 678, 679, 680, 681, 682, 683, 684, 685, 686, 687, 688, 689, 690, 691, 692, 693, 694, 695, 696, 697, 698, 699, 700, 701, 702, 703, 704, 705, 706, 707, 708, 709, 710, 711, 712, 713, 714, 715, 716, 717, 718, 719, 720, 721, 722, 723, 724, 725, 726, 727, 728, 729, 730, 731, 732, 733, 734, 735, 736, 737, 738, 739, 740, 741, 742, 743, 744, 745, 746, 747, 748, 749, 750, 751, 752, 753, 754, 755, 756, 757, 758, 759, 760, 761, 762, 763, 764, 765, 766, 767, 768, 769, 770, 771, 772, 773, 774, 775, 776, 777, 778, 779, 780, 781, 782, 783, 784, 785, 786, 787, 788, 789, 790, 791, 792, 793, 794, 795, 796, 797, 798, 799, 800, 801, 802, 803, 804, 805, 806, 807, 808, 809, 810, 811, 812, 813, 814, 815, 816, 817, 818, 819, 820, 821, 822, 823, 824, 825, 826, 827, 828, 829, 830, 831, 832, 833, 834, 835, 836, 837, 838, 839, 840, 841, 842, 843, 844, 845, 846, 847, 848, 849, 850, 851, 852, 853, 854, 855, 856, 857, 858, 859, 860, 861, 862, 863, 864, 865, 866, 867, 868, 869, 870, 871, 872, 873, 874, 875, 876, 877, 878, 879, 880, 881, 882, 883, 884, 885, 886, 887, 888, 889, 890, 891, 892, 893, 894, 895, 896, 897, 898, 899, 900, 901, 902, 903, 904, 905, 906, 907, 908, 909, 910, 911, 912, 913, 914, 915, 916, 917, 918, 919, 920, 921, 922, 923, 924, 925, 926, 927, 928, 929, 930, 931, 932, 933, 934, 935, 936, 937, 938, 939, 940, 941, 942, 943, 944, 945, 946, 947, 948, 949, 950, 951, 952, 953, 954, 955, 956, 957, 958, 959, 960, 961, 962, 963, 964, 965, 966, 967, 968, 969, 970, 971, 972, 973, 974, 975, 976, 977, 978, 979, 980, 981, 982, 983, 984, 985, 986, 987, 988, 989, 990, 991, 992, 993, 994, 995, 996, 997, 998, 999, 1000.

attack was applicable where the jurisdictional question, although inherent in the case, was neither recognized nor litigated by the parties. It there appeared that the Municipal Debt Readjustment Act, under which the plaintiff district had reorganized, was subsequently held unconstitutional in another case by the Supreme court. Thereafter bondholders of the district who had never submitted to the plan of reorganization brought suit to recover on their bonds. The district pleaded its decree of reorganization under which the bonds had been ordered cancelled. Bondholders demurred to the answer. The Supreme court sustained the decree of reorganization against collateral attack and reversed the trial court's judgment in favor of the bondholders, saying: "The court has the authority to pass upon its own jurisdiction and its decree sustaining jurisdiction against attack, while open to direct review, is res judicata in a collateral action. [Citing Stoll v. Gottlieb, 305 U. S. 165.] Whatever the contention as to jurisdiction may be, whether it is that the boundaries of a valid statute have been transgressed, or that the statute itself is invalid, the question of jurisdiction is still one for judicial determination. *** There can be no doubt that if the question of the constitutionality of the statute had actually been raised and decided by the District Court in the proceeding to effect a plan of debt readjustment in accordance with the statute, that determination would have been final save as it was open to direct review upon appeal. Stoll v. Gottlieb, supra." (Italics ours.) With respect to the question whether bondholders had raised the issue in the proceeding in which they were parties and in which they could have raised it and had it finally determined, the court held that they were not privileged to remain quiet and raise it in a subsequent suit, since "Such a view is contrary to the

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305 U. S. 104, 105...
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well-settled principle that res judicata may be pleaded as a bar, not only as respects matters actually presented to sustain or defeat the right asserted in the earlier proceeding, 'but also as respects any other available matter which might have been presented to that end.'" The effect of that decision was to uphold against collateral attack a decree of reorganization entered by a court which lacked jurisdiction because of the unconstitutionality of the statute under which it had proceeded, and although the issue of the court's jurisdiction had **not** been raised by anyone, the fact that it could have been raised was considered sufficient to render the decree invulnerable. By the same process of reasoning, even though the District Court in the case at bar had not been called upon in an actual contest to pass upon its power under the Bankruptcy Act to release guarantors as part of a plan of corporate reorganization, the fact that it did so in a proceeding conducted under the statute, with full opportunity to bondholders and other parties to raise the point if they so desired, makes the decree of the District Court immune to attack in a collateral proceeding.

We consider the circumstances of the case at bar much stronger against the contention of plaintiff than those in either the Gottlieb or the Chicot County Drainage District cases because the record is replete with uncontradicted evidence that Mrs. Gilbert participated in the reorganization proceeding from beginning to end, having intervened by leave of court, filed her appearance, moved for appointment of a temporary trustee and other relief, objected to the plan of reorganization, filed her proof of claim, attended hearings and cross-examined witnesses. Even though she did not specifically contest the jurisdiction of the court or its right to release the original guarantors, she had full opportunity to do so, and the reorganization having been decreed, notwithstanding her dissent thereto, she had her choice to appeal or

abide by the decree. The conclusions reached in the foregoing decisions, except Barnett v. Gitlitz, were predicated on the doctrine of res judicata, which is applicable to plaintiff's situation; moreover, we think that by reason of her participation in the District Court proceedings, wherein she could have questioned the jurisdiction of the court or adopted the objections and arguments of other bondholders who did so, she is estopped from relitigating the same question in these collateral actions. The judgments of the Municipal court are, therefore, reversed.

JUDGMENTS REVERSED.

Scanlan, P. J., and Sullivan, J., concur.

slide by the decree. The conclusion reached in the foregoing
decisions, except Barrett v. Sullivan, were predicated on the
doctrine of res-judicata, which is applicable to final
situation; moreover, we think that by reason of the peculiar
situation in the District Court proceedings, wherein she could have dis-
tinctly stated the jurisdiction of the court or adopted the objections
and arguments of other bondholders who did so, she is estopped
from relitigating the same question in these collateral actions.
The judgments of the Municipal Court are, therefore, affirmed.
JUDGMENTS REVERSED.

See also, Barrett v. Sullivan, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 90, 91, 92, 93, 94, 95, 96, 97, 98, 99, 100.

31-1-2
4-13-42
STATE OF ILLINOIS
APPELLATE COURT

FILED

MAR 2 1942

David J. Mallon
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

Abstract

October Term, A. D. 1941

41017

Term No. 41033

Agenda No. 12 3

F. C. BRYANT, Administrator of
the Estate of MERLE BRYANT,
deceased,

Plaintiff-Appellee,

v.

DONALD TAYLOR and WILLIAM C.
TAYLOR, co-partners and
doing business as WILLIAM
TAYLOR DRILLING COMPANY,

Defendants-Appellants

Appeal from the

Circuit Court of

Marion County.

3131.A. 65607

CULBERTSON, J.

This is an appeal by Defendants-Appellants, DONALD TAYLOR and WILLIAM C. TAYLOR, co-partners and doing business as WILLIAM TAYLOR DRILLING COMPANY (hereinafter called Defendants), from a judgment in the sum of \$5,000.00 in favor of Plaintiff-Appellee, F. C. BRYANT, Administrator of the Estate of MERLE BRYANT, deceased (hereinafter called Plaintiff) for the death of the said Merle Bryant.

The case was tried upon the issues made by the Third and Fourth Counts of an Amended Complaint, and the Answers thereto. The Fourth Paragraph of the Third Count of the Amended Complaint charges that the defendants, by their servant, carelessly, negligently, wrongfully, and improperly drove their automobile truck upon U. S. route 50, three miles west of Salem, in Marion County, Illinois, without giving the right of way to the deceased, who was then and there driving an automobile upon U. S. route 50 and approaching the intersection from the east, or to the right.

The Fourth Count of the Amended Complaint charges the failure of the defendants to display a red light from the rear end of the said automobile truck, visible for a distance of 500 feet. Each of these counts alleged the deceased Merle Bryant was in the exercise of due care for his own safety. The Answer of the defendants denies the allegations in Counts Three and Four of the Complaint.

The evidence discloses that Merle Bryant died on the 20th day

of June, 1939, as the result of injuries sustained on the 13th day of June, 1939, when an old oil field truck, which had been driven through the mud, pulled upon U. S. route 50 several miles west of Salem (at the intersection of a dirt road which runs north and south, with U. S. highway 50, in Marion County, Illinois), and proceeded in a westerly direction and a collision occurred with the car which plaintiff's intestate was driving. The testimony is in conflict, however, as to whether or not there was any red light on the rear of the truck, there being evidence produced on behalf of the plaintiff that there was no red light on the rear of said truck, and some evidence produced on behalf of defendants that there was a red light on the rear of such truck. The decedent was driving a car in a westerly direction upon said U. S. highway, route 50.

The evidence discloses that Leslie Wilson and John McCorkle, who were employees of the defendants herein, were working in the oil fields south and west of Salem, Illinois, for the defendant Company, and that somewhere around midnight on the night of the accident in question, the said Leslie Wilson left the place of his employment, driving a truck, and following him was the witness John McCorkle driving Wilson's car. The evidence further discloses that as the said Wilson approached route 50 from the south, on a dirt road, that when he got about six feet from the hardroad, he stopped his truck and he testified that he then looked in both directions and that when he looked to the west he observed an automobile coming from the west, which he estimated was traveling at a speed of about 20 or 25 miles per hour and was from 150 to 200 feet west of said intersection. This witness also testified that when he looked to the east he observed the car in which plaintiff's intestate was driving, and that he estimated that that car was a half to three-quarters of a mile away. The evidence discloses that after having made these observations, Wilson pulled out onto the pavement and turned to the left, and that at about the time he got his truck out on the pavement and shifted into second, he passed the car coming from the west, and that he then shifted into high, and that when he had driven between 150 and 200 feet to the west (at which time the

witness testified he was traveling at a speed of 25 miles per hour), the car being driven by Plaintiff's intestate struck the rear end of his truck with great force, causing his truck to leave the pavement and go into the ditch, and the car which plaintiff's intestate was driving ended up in front of his truck, headed north, in the ditch, with the back end of the car on the shoulder, but off of the pavement.

This witness further testified that after the collision the headlights and one rear taillight, were still burning, and the cab light. This witness further testified that in his opinion plaintiff's intestate's car was going at 75 or 80 miles per hour at the time it struck his truck, but that opinion seems to have been based almost entirely on the force with which his truck was struck.

The witness John McCorkle, called on behalf of the defendants, testified that when they left their work, between four and five miles southwest of Salem, at about midnight, they came north, that he was driving Wilson's car and following Wilson, and that at that time there was a light on the right-hand corner, a light on the left-hand corner, and one up on the left-hand side of the cab, back of the driver, and that the light on the right-hand corner didn't have a lens in it (it was a clear bulb), the light on the left-hand corner of the truck was a red lens, and the light on the back of the cab (being up back of the driver) was a red light.

This witness further testified that he drove along behind Wilson, following him closely as he had not been over that road before. This witness further testified that when Wilson got to highway 50 he drove up to the highway and stopped, and that he was there "just a time", and started up and pulled out and turned west; and that after Wilson had turned onto highway 50, he (McCorkle) just waited there until the road cleared, and then pulled out. This witness testified that he observed a car coming from the west and a car coming from the east, going west, and that he thought the car coming from the west was about 150 or 200 feet away when Wilson turned onto highway 50, and that that car drove on through and came on east; and that he also observed the car coming from the east and

and that it was between a half and three-quarters of a mile east when he observed it, and that in his opinion it was going 75, or 80 miles, or maybe maybe/a little under that, and it might have been a little over, when it passed him when he was waiting to drive onto the hard road.

The evidence in this case discloses that plaintiff's intestate sustained injuries in this accident, from which he died. The evidence further discloses that Plaintiff's intestate was a young man, 25 years of age, in good health, and engaged in the business of cleaner and presser, and that his income was about \$30.00 a week, and that he had contributed and was materially contributing to the support of his parents, and also was giving some financial assistance to a brother.

Several witnesses were called who gave varying testimony as to the kind and number of lights on the rear of the truck involved in this accident. Several witnesses also gave testimony as to the relative positions of the automobile and the truck shortly after the accident, and described the damage done to the car and to the truck.

No claim is made on this appeal that the judgment of the Court entered on the verdict, is excessive, nor is any error assigned on the admission or rejection of evidence in the trial of this case, nor is it contended that any error was committed by the Trial Court in the giving or refusing of instructions. The only assignments of error made and urged in this Court are: (1) The refusal of the Trial Court to direct a verdict in favor of defendants; and to allow the motion for judgment notwithstanding the verdict; and (2) That the judgment appealed from is contrary to the law and to the evidence.

In giving consideration to the first assignment of error it must be borne in mind that it is the well-settled law of this State that in considering a motion for a directed verdict or for a judgment notwithstanding the verdict, that if the evidence in favor of the plaintiff, standing alone and considered true, together with all legitimate inferences therefrom, the jury might not reasonably have found for plaintiff, that the Court cannot weigh the evidence (Blumb v. Getz, 366 Ill. 273, 277; Mesce v. City of Chicago, 301 Ill.App. 430).

In this case there is a conflict in the testimony and this Court has not the right to set such judgment aside, unless it is satisfied that it is manifestly against the weight of the evidence (People v. Dieckelmann, 367 Ill. 372; Jones v. Esenberg, 299 Ill. App. 551), nor are we persuaded that the judgment appealed from is contrary to the law and the evidence.

It is contended that plaintiff's intestate was guilty of contributory negligence that would bar a recovery by plaintiff in this case. The question of contributory negligence is ordinarily one of fact for the jury to decide under proper instructions. Contributory negligence becomes a question of law only when it can properly be said that all reasonable minds would reach the conclusion, under the facts stated, that such facts did not establish due care and caution on the part of the person charged therewith (Thomas v. Buchanan, 357 Ill. 277). The record in this case discloses no evidence that would make the question of plaintiff's intestate's exercise of due care and caution other than a proper question of fact for a jury.

We are persuaded, and so hold, that the judgment in this case is not against the manifest weight of the evidence, and, therefore, should not be disturbed. There was presented for determination by the jury in this case, a well-defined issue of fact and it has been passed upon by a jury, and a judgment of the Court entered upon the verdict of the jury, in favor of the plaintiff, and as a Court of Review, we have no right to substitute our opinion for that of the jury in a case of this nature so long as the verdict of the jury is supported by sufficient evidence (Avery v. Medaris, 272 Ill. App. 209).

There being no error in this Record that would in any wise warrant our interfering with the judgment of the Circuit Court of Marion County, and said judgment, in our opinion, being correct and proper, the same is hereby affirmed.

Judgment affirmed.

FILED

MAR 2 1941

David J. Mallick
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

October Term, A. D. 1941

Term No. 41021

Agenda No. 7

~~Publ in Fall~~
JOHN DOWSON,
Plaintiff-Appellant,
v.
WALTER SMITH,
Defendant-Appellee.

Appeal from
Circuit Court
Marion County.

CULBERTSON, J.

313 I.A. 650² 736
108

This is an appeal from a judgment of the Circuit Court of Marion County, Illinois, against Plaintiff-Appellant, JOHN DOWSON, (hereinafter called Plaintiff), and in favor of the Defendant-Appellee, WALTER SMITH (hereinafter called Defendant). This cause was tried before the Court, without a jury.

This case arose out of an automobile accident which occurred on the 9th day of March, 1940, at which time the plaintiff was driving and operating a 1940 model Plymouth tudor sedan, in a southerly direction along route 51, at a point about three miles south of the Village of Patoka, in Marion County, Illinois. It was contended by the plaintiff that while he was driving his automobile in a southerly direction along route 51 that the defendant (who was also driving south on said route), after plaintiff had signalled his intention to pass the defendant, the said defendant failed to give way to the right and turned his car into the path of the plaintiff's automobile.

The evidence in this case discloses that as the plaintiff was driving south on said route, that his father-in-law was seated on the right-hand side of the car, in the front seat, and his brother-in-law, Clyde Ehrat, was sitting in the center of the front seat; that plaintiff's wife, and Mary Ehrat, Marie Holt, and a small daughter of the plaintiff, were riding in the back seat; and that



said party was then enroute to Salen to see the oil field and to visit a friend. The evidence further discloses that the defendant was driving and operating a Chevrolet coupe and was the only occupant of his car. The evidence discloses that it was a bright, warm day, and that the pavement was dry.

The plaintiff testified that when he first observed the defendant's car, he was driving approximately 45 miles an hour, and that when he came up behind the defendant's car and as he started to go around defendant's car, he sounded his horn twice, and turned out on the left side of the road; that when he was even with defendant's car, they were about 35 feet south of a bridge on route 51, and that there were guard rails north of the bridge; that as plaintiff was about even with the south end of the guard rail, defendant crowded him off of the pavement, and at that time defendant was coming to the left; and that just before plaintiff's car collided with the culvert, the defendant's car was on the left side of the black line. The evidence discloses that as the result of this accident, the plaintiff was injured and was taken to a hospital, that he remained there for some 26 days and had an operation as a result of the accident. The evidence does not disclose that plaintiff sustained any permanent injury.

The plaintiff's father-in-law testified that plaintiff sounded his horn twice as plaintiff started to pass the defendant's car, and that when he did so, the defendant "came in right across the road," and that plaintiff turned to the left to keep from hitting the defendant and hit the concrete culvert. This witness testified that plaintiff was going probably 45 or 50 miles an hour at the time of the accident, and that he "might have driven a little faster."

The witness, Clyde Ehrat testified that after plaintiff pulled out, the defendant pulled over the black line and in ahead of plaintiff's car. The ladies seated in the back seat of plaintiff's car also testified as to how the accident occurred from their observation of it.

Defendant, who was a hardwood lumber dealer, 58 years of age,

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and residing at Patoka, testified, among other things, that on the day of the accident he was driving south from Patoka to his sawmill, which is located on the west side of the hard road, two and one-half miles south of Patoka. Defendant further testified that his sawmill was just west of a culvert, south of a bridge, and that the driveway into his sawmill was 17 feet wide; that as he approached the driveway he was driving between 15 and 20 miles per hour, and that he observed, through his rear view mirror, a car coming behind him, about 300 feet to the rear of his car, and that there was a car approaching him also, from the south, about three or four hundred feet to the south. Defendant testified that he was driving on the west, or right-hand side of the road, going south, and that he was on the south side of the bridge when he first knew that the plaintiff's car was going to pass him, and was at that time driving 15 miles an hour. Defendant further testified that at no time did he pull his car over east of the black line, but that plaintiff's car "grabbed hold" of his car and it "ran against him and went off to the left." The defendant further testified that the right end of plaintiff's rear bumper caught on the front side of defendant's left rear fender, next to the running board, and that immediately after defendant's car was caught by plaintiff's bumper that plaintiff's car hit the culvert on the left side of the road, with the left front wheel of plaintiff's car. The evidence further disclosed that marks on the pavement after the accident showed defendant's car had been dragged to the left toward the culvert on the east side of the road. Defendant testified that he did not hear any signal from plaintiff's car of any intention to pass, and that when he began to slow down he held his right hand up in the air and put his foot on the brake and pressed on the brake continuously, and that it was never his intention to go into the east lane on the highway, and he did not go into the east lane on the highway at any time.

Daniel Kinney, a witness called on behalf of the defendant, who resided at Salem, Illinois, and was employed by an ice company, testified that at the time of the accident he was about eight or

nine hundred feet north from the place where the accident occurred, and that he saw the accident as it occurred. This witness testified that he was in an automobile, going south from Patoka, and was just going to turn into a lane which led to his father's place, and which was about two blocks north of the bridge; that plaintiff's car passed him about 150 or 200 feet north of the lane where he was going to turn off, and that at the time plaintiff's car passed him, in his opinion, plaintiff was traveling between 60 or 65 miles an hour, and that it did not look to him as if plaintiff slackened his speed up to the time of the accident. This witness testified that he saw the two cars come together and that defendant's car was on the right side of the pavement, traveling south, and after the collision the cars went off angling across to the east side of the road. This witness further testified that the skid marks started a foot on the west side of the black line. He further testified that at no time prior to the accident was the defendant's car on the east side of the black line and that it didn't look as if defendant's car was going very fast.

Herman Wilken, of Patoka, another witness called on behalf of the defendant, testified that on the day of the accident he was at the saw mill of the defendant, about 100 feet west of the hard road, and that he was there waiting for Mr. Smith who had sent him there to load some lumber for him. He testified that he saw the defendant's car coming down the road when it was 300 feet north of the driveway (or, about 250 feet north of the bridge), and at that time it was on the right side of the road, going south, at a speed of about 20 miles an hour. He testified that he watched the defendant's car until the accident happened, and at no time did defendant drive over to the east of the black line. This witness further testified that plaintiff's car was about 300 feet north of the mill lot when he first observed it and, in his opinion, plaintiff was driving around 60 miles an hour, and that plaintiff hit the back end of defendant's car and went into the culvert. This witness further testified that he did not hear any horn sounded by the plaintiff.

An examination of the statement, brief, and argument of

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plaintiff-appellant fails to disclose the specific error on which plaintiff-appellant relies for reversal of the judgment of the Court in this case, but we gather from the argument that it is urged in this Court that the judgment of the Trial Court should be reversed for the reason that it is contrary to the manifest weight of the evidence.

It would appear to us from an examination of the record in this case that an issue of fact was presented to the Trial Judge who heard this case and tried same without a jury, and his finding is entitled to the same weight as is a verdict of the jury, and will not be disturbed by an Appellate Tribunal, unless it is manifestly against the weight of the evidence (Moore v. David J. Molloy Co., 222 Ill. App. 295, 298; People etc. v. C. & E. I. Ry. Co., 258 Ill. App. 535, 540; MacCracken v. First Nat'l Bk. of Wheaton, 204 Ill. App. 20, 21; Hankins v. Colley, 106 Ill. App. 522).

In giving consideration to the question of whether or not the finding of the Trial Court is contrary to the manifest weight of the evidence, a Reviewing Court must have regard for the better opportunity of the Trial Court to determine the facts by reason of its opportunity to see and hear the witnesses (Marble v. Marble, 304 Ill. 229, 232; City of Quincy v. Kemper, 304 Ill. 303, 307).

There was in this case a positive burden upon the plaintiff to prove by a preponderance of the evidence the negligence of the defendant, as charged, and his own freedom from contributory negligence (Dyer v. Talcott, 16 Ill. 300; Abramovitz v. Chi. City Ry. Co., 172 Ill. App. 208, 211; Ashland Auto Garage v. Chi. Rys. Co., 183 Ill. App. 207, 208; Lehigh Valley Trans. Co. v. Cook, 138 Ill. App. 405, 407).

The evidence in this case persuades us, and we so hold, that the judgment of the Court in this case is not against the manifest weight of the evidence, but the evidence, on the contrary, gives abundant support to the finding and judgment of the Trial Court in favor of the defendant.

There being no error in this case and the judgment being right under the law and the evidence in this case, the same is hereby affirmed.

Abstract

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

FILED
1941
Daniel J. Marshall
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT

October Term, A. D. 1941.

Term No. 41031

Agenda No. 15.

HORACE McCAUGHAN, Adminis-
trator of the Estate of
PETE McCAUGHAN, deceased,

Plaintiff-Appellee,

v.

STANLEY BOSWELL,

Defendant-Appellant.

Appeal from the

Circuit Court of

Union County, Illinois.

CULBERTSON, J.

313 I.A. 651 / 09

This is an appeal from a judgment in the sum of \$4,000.00 entered in the Circuit Court of Union County, in favor of Plaintiff-Appellee, HORACE McCAUGHAN, Administrator of the Estate of PETE McCAUGHAN, deceased (hereinafter called Plaintiff), and against Defendant-Appellant, STANLEY BOSWELL (hereinafter called Defendant).

This case was tried before a Court and jury, and a verdict of \$4,000.00 was returned by the jury. Thereafter a Motion for a New Trial was made, argued, and denied, and judgment was entered on the verdict from which judgment this appeal follows.

The complaint in this case charges the defendant with having been negligent in one of the following respects:

- (a) Driving at a greater speed than reasonable;
- (b) Driving a car with defective brakes;
- (c) Failing to turn to the left in passing a car going the same direction;
- (d) Negligently and carelessly managing his automobile and causing it to run into an automobile being driven by plaintiff's intestate while both of said automobiles were moving in an easterly direction, and using the south side of the highway.

The answer of the defendant denies the charges of negligence on the part of the defendant, and states that plaintiff's intestate was the cause of the accident by his negligence in suddenly stopping without giving a signal, or suddenly reducing his speed without giv-

ing a signal. Defendant urges in this Court that the judgment of the Circuit Court of Union County should be reversed for the reason that the verdict of the jury is clearly and manifestly against the weight of the evidence and that plaintiff's intestate was guilty of contributory negligence, and it is also urged that the Court erred in giving certain instructions to the jury at the request of the plaintiff, and that the verdict is excessive and not supported by the evidence.

This case arises out of an accident which occurred on October 28, 1938, at about eleven o'clock at night, on State Route 146, seven miles east of Anna, Illinois. State Route 146 is a concrete paved highway, running east and west, eighteen feet in width, with the center marked by a black line. At the place where this accident occurred visibility is limited due to the fact that there is a rise in the pavement in the direction in which the cars were going.

The evidence discloses there is a lunch room and filling station, called Locust Grove, on the north side of the road where the accident occurred and that provision is made for cars going either east or west to enter this station, the outside limits of the entrances being about 200 feet apart, said lunch room and filling station being about midway between said entrances.

Plaintiff's intestate was driving a 1929 model, Graham Paige, eastward on said route at the time of the accident, a Mrs. Cavender being seated in the front seat with him, holding a small boy on her lap, and in the rear seat and seated on the left-hand side was a Mr. Corn, and on his right, June Schutt. The defendant, Stanley Boswell, lived on a farm east of where the accident occurred and was returning to his home from Anna, Illinois, driving a Chevrolet Sedan.

From the evidence produced on behalf of the plaintiff, it appears that plaintiff's intestate was driving east on the highway, and as he approached the west entrance to Locust Grove, slowed down to turn into the restaurant for a lunch when other occupants

of the car called his attention to the approach of two cars, one from the east and one following them from the west, at very high rates of speed, and that instead of driving into the restaurant, plaintiff's intestate increased his speed and drove straight on down the highway and when he had reached a point about 50 or 60 feet west of the east entrance to Locust Grove, the car in which Plaintiff's intestate was riding was struck on the left rear end by the car driven by the defendant. It appears from the evidence that at that time plaintiff's intestate's car was on the south side of the paved highway and the force of the impact knocked plaintiff's intestate's car a distance of about 65 feet to the right, off the highway, and the car stopped with the front of the car facing west. The force of the impact was such that the left rear end of plaintiff's intestate's car was badly damaged, and plaintiff's intestate and Mr. Corn (both of whom were seated on the left side of the car) were killed.

It appears from the evidence plaintiff's intestate was an unmarried man, able-bodied, 29 years of age, residing with his father and mother, two brothers, and two sisters. The evidence disclosed he was employed as a miner's helper and contributed to the support of the family. The amount and extent of his contributions to the support of the family is disputed in this case, and proof along that line, we believe, was unduly and improperly restricted by the court when an objection was made and sustained to the testimony of Dorothy McCaughan Bell, a sister of plaintiff's intestate. Under the provisions of Section 2, Chapter 51 of the Illinois Revised Statutes (State Bar Edition, 1941), we believe this witness was competent for the purpose of testifying concerning contributions plaintiff's intestate had made to the support of the family from his earnings (Mann v. Mann, 270 Ill. 83), and while this Record does not disclose an offer of proof having been made in connection with this witness, we are disposed to hold that if the evidence as to support furnished by plaintiff's intestate to his family from his earnings is not as full and complete as it could well be, that the defendant

evidence in the Record that there were black marks, extending east on the road, 22 inches south of the black line dividing the center of the east and west highway, 65 feet, 3 inches long, and that these black marks started about midway of the two entrances to Locust Grove and extended easterly to the south and to the edge of the slab, and that there were skid marks on the shoulder that appeared to be an extension of the marks where plaintiff's intestate's car was overturned. There was also some broken glass on the pavement at about the same point.

In this case there is a conflict in the testimony, and this Court has not the right to set such judgment aside unless it is satisfied that it is manifestly against the weight of the evidence People v. Dieckelmann, 367 Ill. 372; Jones v. Esenberg, 299 Ill. App. 551; Graham v. Dressen, 292 Ill. App. 15.

A careful examination of the evidence in this case persuades us and we so hold that the judgment in this case is not against the manifest weight of the evidence and should not be disturbed. A Court of Review has no right to substitute its opinion for that of the jury in cases of this nature so long as the verdict of the jury is supported by sufficient evidence (Avey v. Medaris, 272 Ill. App. 209).

We do not find any evidence in this Record that would warrant this Court in holding that plaintiff's intestate was guilty of contributory negligence, as a matter of law. Questions as to what is the proximate cause of an injury, as to contributory negligence, as to the credibility of witnesses, as to the weight to be given evidence heard on the trial and the inferences to be drawn from the facts proved, are ordinarily all questions for the jury to pass upon, and not for the Court to decide (Malloy v. Chicago Rapid Transit Co., 335 Ill. 164).

We have examined all of the instructions, the accuracy of which are challenged on this appeal, and we are persuaded, and so hold, that there was no reversible error committed in the giving of any of such instructions. There were ten instructions given on

behalf of plaintiff and fifteen instructions given on behalf of defendant. Considered as a series these instructions, in our opinion, correctly instructed the jury.

It is finally urged that the verdict is excessive and not supported by the evidence. We do not find ourselves in accord with this contention, and it seems to us, and we so hold, that a \$4,000.00 verdict in this case was not excessive.

There being no error in this Record that would justify a reversal of this case, and it appearing to us that the judgment should be affirmed, it is, therefore, hereby accordingly affirmed.

Judgment affirmed.

FILED

MAR 2 1942

David J. Mallitt
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

Abstract

STATE OF ILLINOIS
APPELLATE COURT

October Term, A. D. 1941.

Term No. 41034

Agenda No. 16.

E. FRANK JONES, H. P. DUNN,
GEORGE D. DALY, ROY MILLER,
BERNARD C. PATTERSON,
FOREST G. WIKHOFF, WM. D.
SNYDER, R. S. WAGGONER,
JOS. G. WEBSTER, ARTHUR C.
JONES, MARY J. WEBSTER,
RICHARD E. ECKERT, DAVID
H. MOREY, N. S. HENNIGAN
and SELMA B. BEARE,

Plaintiffs-Appellees,

v.

JOS. GREENSPON'S SON PIPE
CORPORATION, a Corpora-
tion,

Defendant-Appellant.

Appeal from the

Circuit Court of

Clinton County,

Illinois.

313 I.A. 651²

CULBERTSON, J.

This is an appeal from a judgment in the amount of \$2500.00, entered in the Circuit Court of Clinton County, in favor of Plaintiffs-Appellees, E. FRANK JONES, H. P. DUNN, GEORGE D. DALY, ROY MILLER, BERNARD C. PATTERSON, FOREST G. WIKHOFF, WM. D. SNYDER, R. S. WAGGONER, JOS. G. WEBSTER, ARTHUR C. JONES, MARY J. WEBSTER, RICHARD E. ECKERT, DAVID H. MOREY, N. S. HENNIGAN and SELMA B. BEARE (hereinafter called Plaintiffs), and against Defendant-Appellant, JOS. GREENSPON'S SON PIPE CORPORATION, a Corporation (hereinafter called Defendant). This cause was tried before the Court, without a jury.

The complaint in this cause alleged that the defendant, on or about March 15, 1939, and on other days between that date and the time of the commencement of the suit, with force and arms and without leave or license, wrongfully and unlawfully entered onto the leasehold premises belonging to the plaintiffs and then and there did wrongfully and unlawfully commit the following acts, to-wit: Removed the tubing, rods and equipment in the oil well on

said premises; shot the casing in said well and removed the casing, which was cemented therein; ruined said oil well; and attempted to plug said oil well and ruin said oil well as a producing well; to the loss and damage of the plaintiffs of the sum of \$10,000.00; and that by reason of the wrongful acts of the defendant, the plaintiffs were deprived of the use of said oil well and the oil to be produced therefrom, to the damage of the plaintiffs in the sum of \$10,000.00. The suit was instituted by E. Frank Jones, who originally acquired the lease and drilled the well, and by all those to whom he had made assignments.

The defendant filed an answer and counter-claim denying that the plaintiffs, or any of them, were the owners of the pipe and casing mentioned in the complaint, or that they were a part of the lease, and set out that by virtue of the terms of a certain conditional sales contract entered into between the plaintiff, E. Frank Jones, and the defendant as the seller, which conditional sales contract was made a part of the amended answer, plaintiffs never had any right, title, or interest in or to the pipe and casing in question, and generally denied the other allegations of plaintiffs' complaint. The defendant's counterclaim against E. Frank Jones alleged that the said E. Frank Jones was indebted to the defendant in the amount of \$231.23, together with interest and costs. The Court, upon the hearing, found adversely to the plaintiff in the counter-claim, and found in favor of the plaintiffs in the original suit in the amount of \$2500.00.

From the evidence in this case it appears that the plaintiffs, E. Frank Jones, leased lot 16 in Block 7 of the Second Home Terrace Addition, Clinton County in the city of Centreville and cause to be drilled thereon an oil well. The oil well in question in this case, when first drilled, swabed the first day, about 30 barrels and the second day, about 25 barrels. It appears that when the cable tool men were drilling the well into completion, they dropped the bailer in the hole, and after this happened, the production of the oil went down to only a few barrels per day. Pumping then ceased and

cable tools were put on the hole in an effort to drill up the bailer. At about this time the plaintiff, E. Frank Jones, ceased working on this well and went over into Fayette County (according to his testimony) to do some work there in an effort to earn and procure money to do further work on the well in question in this case. While the plaintiff Jones was in Fayette County, it appears from the evidence, the defendant herein became impatient about the money owed to it by Jones for certain pipe that had been used in connection with the well in question and without any authority, so far as the Record in this case discloses, the defendant went upon the premises and proceeded to shoot and pull the pipe from the well, and in so doing the well was ruined. It also appears that in removing its pipe, the defendant not only took pipe that had been sold by it to plaintiff Jones, but also took certain other property about the premises, upon which it certainly could not have had any claim. It appears from the evidence that the well in question was drilled in proven territory, and that there were other producing wells in close proximity of the well in question.

Defendant, in this Court contends it is entitled to a reversal in this case for several reasons, (First), That all necessary parties were not properly before the Court either as plaintiffs or defendants. This contention being advanced for the reason that the lessor (the owner of the usual 1/3th royalty) is not made a party to this suit. No authority has been brought to our attention holding the lessor to be a necessary or a proper party to this proceeding. Plaintiffs, as the owners of the leasehold estate, are claiming damages for wrongful trespass on the part of the defendant in destroying its value. The landowner had no interest in this leasehold estate and, in our opinion, was neither a proper, nor a necessary party to this Common Law action.

Defendant also contends that it had a legal right to remove the casing in question for the reason that it was sold on a conditional sales contract and had not been paid for, and defendant was within its right in removing it. Defendant's contention in this

regard, we do not believe is well founded as the evidence discloses that this casing, which was sold by the defendant to the plaintiff Jones on a conditional sales contract, was to be used and cemented in this well, and that it would be used in the well, and having been so affixed it could be only partially removed by using high explosives to shoot it off, and to attempt that course would be to occasion damage to the casing itself, and damage to the well. Under the ruling announced in the case of Sears, Roebuck & Co. v. Piassa Bldg. & Loan Assn. 276 Ill. App. 379, at page 393, we are persuaded, and so hold, that the defendant was not within his rights in removing the casing and occasioning the resultant damage.

Defendant earnestly contends in this Court that the well in question was an abandoned well at the time of the removing of the casing. An examination of the evidence in this regard persuades us, and we so hold, that there is abundant evidence in the record that the well was not an abandoned well.

Defendant also contends that, assuming the plaintiffs had a right to recover, there is no evidence to support the judgment of the Trial Court in excess of the salvage value of the well in question. We have carefully examined the evidence in connection with the question of damages in this case and from that examination are of the opinion that there is abundant testimony in the Record upon which the Court could have found in favor of the plaintiffs in the amount of \$2500.00.

It is finally contended that the Court below committed error in refusing to allow the defendant a judgment against plaintiff Jones on its counter-claim. A careful consideration of this contention brings us to the conclusion that it is without merit.

This case was tried before the Court, without a jury, and the Trial Court had an opportunity to and did observe the demeanor of the witnesses while they were testifying, and we would not be at liberty to substitute our opinion for that of the Trial Court on these questions of fact, unless we are able to say that the finding of the Trial Court is manifestly against the weight of the evidence

Moore v. David J. Molloy Co., 222 Ill. App. 295, 298; People, etc. v. C. & E. I. Ry. Co., 253 Ill. App. 535, 540; MacCracken v. First Nat'l Bank of Wheaton, 204 Ill. App. 20, 21; Henkins v. Colley, 106 Ill. App. 522).

A careful consideration of the evidence persuades us, and we so hold, that the finding of the Trial Court is not against the manifest weight of the evidence, but finds abundant support therein.

There being no error in this Record, the judgment of the Circuit Court of Clinton County, is hereby affirmed.

Judgment affirmed.

FILED

MAR 2 1942

David J. Mallitt
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

STATE OF ILLINOIS

APPELLATE COURT

October Term, A. D. 1941

Abstract

Term No. 41012

Agenda No. 9

ELLA FREEMAN,

Plaintiff-Appellant,

vs.

THE LEADER MERCANTILE
COMPANY, a Corporation,

Defendant-Appellee

Appeal from the

City Court of the

City of Granite City.

Dady, J.

313 I.A. 652'

Plaintiff appeals from a judgment for defendant notwithstanding the verdict. The verdict was in favor of the plaintiff and assessed her damages at \$4500.

Plaintiff was severely injured on November 9, 1930, through falling on a stairway in a two story building in Granite City. The building was and for several years had been occupied by defendant as a general store, and plaintiff was then in the store as a customer.

This stairway led from the first to the second floor and was made up of two sets of stairs, and a landing at about the center of such stairs. Four wooden steps about six feet wide led from the first floor to the landing. The landing, also of wood but covered with linoleum, was about eight feet wide and ten feet long. A similar set of steps led from the landing to the top floor. There was no covering on the steps and no metal on the edge of the steps. The kind of wood used is not shown. The accident happened while plaintiff was descending or about to descend from the landing to the lower floor.

Plaintiff testified that she descended from the second floor to the landing and then began to descend from about the center of the edge of the landing to the first floor; "that there

are four steps from the first floor to the landing and the landing makes another step"; that in so descending she first stepped from the landing with her right foot and such right foot slid off the rounded edge of the top step, and she then fell on the stairs; that she started to slip on the edge of the landing; that her right leg doubled under her and was broken; that the heel of her left shoe was torn off in the fall; that while sitting or lying on the stairs after the fall she looked back to see what caused the fall and noticed that the landing was covered with old linoleum, and that the linoleum on the edge of such landing was worn off for a distance of about a foot, and the wood underneath was worn slick; that the steps were so worn that they were rounded on the outer edge; that "when I say the step was worn I mean a piece was worn off of it, taken out of the wood" on the landing; that the steps were worn off and slick from natural wear.

The proofs show that the stairway had been in the same general condition for at least five years, and during such time had been constantly used by a great many customers.

The only question presented is whether the trial court erred in entering the judgment notwithstanding the verdict, and the foregoing is all of the testimony material to such question.

Defendant does not contend that plaintiff was not in the exercise of due care or that she was not injured as a result of the accident, but only contends that plaintiff "failed to establish legal negligence."

In passing on a motion for a judgment notwithstanding the verdict the rules applicable on a motion for a directed verdict should be applied. The evidence must be considered in its aspect most favorable to the plaintiff, together with all reasonable inferences to be drawn therefrom, and the court is required to assume that the evidence favorable to the plaintiff is true. The evidence must not be weighed and all contradictory or explanatory circumstances must be rejected. The only inquiry is whether there is any evidence fairly tending to prove the plaintiff's complaint.

If there is any evidence fairly tending to prove the complaint the motion must be denied, even though the court is of the opinion that a verdict for the plaintiff, if given, must be set aside as against the preponderance of the evidence. (Synwolt v. Klank, 296 Ill. App. 79; Hunter v. Troup, 315 Ill. 293; Osborn v. Leuffgen 312 Ill. App. 251.)

If a reasonably prudent person might, and ordinarily would, foresee that the omission to do a certain act, or the commission of an act in a certain way, would result in injury to another, an injury to another does follow as a result thereof, such act of omission or commission is negligence and the proximate cause of the injury. (Wintersteen v. National Cooperage Co., 361 Ill. 95.) Where the facts are such that reasonable men of fair intelligence may draw different conclusions, the question of negligence must be submitted to the jury, (C & NW Ry v. Hansen, 166 Ill. 623), and, if negligence exists, its degree, whether slight, ordinary or gross, must always depend upon the evidence, and is not to be determined by the court as a question of law, where there is evidence tending to prove the particular fact. Wabash Ry. Co. v. Brown, 152 Ill. 484.)

Another rule of law applicable to this particular case is that it was the duty of the defendant to exercise ordinary care to maintain such stairway in a reasonably safe condition (Pollard v. Broadway Central Hotel Corp., 353 Ill. 312).

The specific charge of negligence in the complaint is that the defendant negligently kept and maintained the stairway in a dangerous and defective condition, in that the steps were worn, depressed, uneven and parts thereof worn and broken away, causing said steps to become slick and slippery.

Applying the foregoing rules of law, and assuming the testimony most favorable to the plaintiff to be true, as we are required to, considered in its aspect most favorable to the plaintiff, it is our opinion that reasonable men of fair intelligence might draw different conclusions from such evidence, and it is our

opinion that there is some evidence fairly tending to prove that the landing was covered with old linoleum, that the linoleum on the edge of the landing was worn off for a distance of about a foot, and the wood underneath was worn slick, that the steps were so worn that they were rounded on the outer edge, that the steps were worn slick and slippery from natural wear and that plaintiff slipped and fell and was injured because of such slippery condition of the stairs and landing. We are also of the opinion that the jury would have been justified in finding that such condition of the steps and landing had existed for such a length of time that the same should have been discovered and remedied by the defendant in the exercise of reasonable care.

We are therefore of the opinion that the plaintiff made a prima facie case of actionable negligence, and that the trial court erred in entering the judgment in question. To hold otherwise would put us in the position of arbitrarily passing on the weight and sufficiency of the evidence, which we should not do.

Many floor and stairway cases have been cited. In no Illinois case were the facts very similar to the facts in the instant case, and we do not consider it useful or helpful to enter into any detailed discussion of such cases. Of the cases cited, Bennett v. Jordan Marsh Shoe Co., 216 Mass. 550, 140 N. E. 479, is the closest on the facts. In that case the court said: "There was * * * evidence that the outer edge of the treads where the plaintiff fell had been permitted by defendant to wear smooth and to become rounded and slippery; and the questions whether the treads had become defective and whether that condition could have been discovered by proper inspection were for the jury." In Acme Harvester Co. v. Chittick, 230 Ill. 558, the court said: "There is, however, found in this record ample evidence, if true, which tends to establish that the floor immediately in front of the machine upon which the appellee was at work was worn and was smooth and slippery. Where there is evidence in the record which

fairly tends to support a cause of action, this Court cannot weigh the evidence, but must hold, as a matter of law, that the plaintiff has sustained his cause of action. We are therefore of the opinion that the Circuit Court did not err in declining to take the case from the jury."

The judgment of the city court is reversed and the cause is remanded to such court with directions to overrule the motion of the defendant for a judgment in favor of the defendant notwithstanding the verdict, and to pass upon the motion for a new trial, if one shall be made; and if such motion for a new trial is overruled, or if a motion for a new trial is not made, to then enter judgment on the verdict in favor of the plaintiff.

Reversed and remanded with directions.

FILED

MAR 2 1941

David J. Mallitt
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

Abstract

IN THE
APPELLATE COURT OF ILLINOIS
FOURTH DISTRICT
OCTOBER TERM, A. D. 1941

Term No.
41020

Agenda
No. 25.

A. H. SEBASTIAN,
Plaintiff-Appellant,
SCHOOL DIRECTORS OF DISTRICT
NO. 17, COUNTY OF MARION
AND STATE OF ILLINOIS
Defendants-Appellees

Appeal from the
Circuit Court of
Marion County.

3131.A. 852²/12

Dady, J.

Plaintiff, A. H. Sebastian, brought this suit against the School Directors of District No. 17 of Marion County, Illinois to recover the sum of \$275.41 for the payment of school supplies furnished by the plaintiff to the district. The cause was heard before the court without a jury and resulted in a judgment for the plaintiff for \$175.41. Plaintiff has taken this appeal. His only contention here is that he is entitled to a judgment for \$275.41 and not \$175.41 as entered by the trial court. The defendants have not followed plaintiff's appeal to this court.

A brief statement of the facts is essential. Plaintiff was engaged in the business of selling school supplies and employed one W. L. Jackson as his salesman. Jackson met the three directors at the of the district/school in an effort to sell school supplies to the district. He failed to make a sale at this meeting. However, several days later (but not at a regular or special or adjourned meeting of the directors) he met two of the directors and secured their written order for the supplies in question. The third director was not present when the order was signed and did not thereafter at any time sign, approve or ratify the order. Nor was such order thereafter ever ratified or approved by the directors at a

regular or special or adjourned meeting. The supplies listed in the order were delivered to the district with an invoice. The items of supplies and the prices therefor listed in the written order corresponded with the invoice except for an item of sweeping compound amounting to \$3.87 which was not included in the order but was added to the invoice. The aggregate of the prices listed in the invoice amounted to \$275.41, which is the amount plaintiff claims he is entitled to recover.

To support his contention plaintiff argues that the written order signed by the two directors constituted a binding agreement on the part of the district to pay the prices listed in the order. We cannot agree with this contention. At the time the two directors signed the order they had no power to act for and in behalf of the district. At the time they signed such order they were acting separately and individually and not as a body regularly convened at a regular or special or adjourned meeting. They acted in direct violation of the statute then in force, which provided that no official business should be transacted by the directors except at a regular or special meeting. (Chapter 122, Paragraph 119, Illinois Revised Statutes, 1939). It was to correct the very practice followed in this case by the plaintiff's salesman and the two directors that the statute referred to was enacted. We hold that the written order had no binding effect as a contract on the district. (Crawford v. Board of Education District No. 98, 215 Ill. App. 198). It follows that the prices listed for the supplies in the order cannot control or fix the amount of plaintiff's recovery in this case.

Plaintiff also urges that in any event he is entitled to recover the reasonable value of the supplies. It is true that if the plaintiff is to recover in this case he must rely upon the principle that where a municipal corporation has received the benefits under a contract which was merely ultra vires, that is a contract which was within the general powers of the corporation to

make but which was void because the power was not properly exercised, such corporation is bound to pay the reasonable value of the property received by it in an action based upon a quantum meruit. (People v. Spring Lake District, 263 Ill. 479; Stripe v. Yager, 348 Ill. 362.)

Plaintiff introduced evidence tending to show that the prices listed for the supplies in the invoice and order represented the reasonable and fair cash market value of such supplies at the time they were delivered to the district. He contends that there was no evidence to the contrary which would justify the action of the trial court in reducing his claim to \$175.41. We have examined the record and find that there was evidence introduced by the defendant tending to support the trial court's findings in this regard. The rule is that where a case is tried before the court without a jury, unless a reviewing court can say that the findings of the trial court are palpably against the weight of the evidence, such findings will not be disturbed. (Winnetka Park District v. Hopkins, 371 Ill. 46). We are unable to say that it was manifestly against the weight of the evidence for the trial court to find the reasonable cost of the supplies was only \$175.41, and accordingly conclude that the judgment of the trial court should be and is affirmed.

Judgment affirmed.

Abstract

APPELLATE COURT

FOURTH DISTRICT

Term No.
41023

October Term, A. D. 1941.

Agenda
No. 17.ST. ANTHONY'S HOSPITAL OF THE
SISTERS OF ST. FRANCIS, INC.,
Plaintiff-Appellant,

vs.

THE COUNTY OF FAYETTE,
Defendant-Appellee,
andTHE TOWN OF AVENA IN THE SAID
COUNTY OF FAYETTE,
Defendant-Appellee.

Appeal from the

Circuit Court of

Fayette County,

Illinois

313 I.A. 653

DADY, J.

Plaintiff brought suit against the County of Fayette and against the Town of Avena in said county for hospitalization services rendered one Lautzenheiser, hereafter referred to as "the patient," from March 4th, 1939, to December 25th, 1939. The case was tried without a jury and the trial court entered judgment for the defendants. Plaintiff appeals. The complaint, in the alternative, asked for judgment against one defendant or the other.

In his printed brief and argument counsel for plaintiff says the Town of Avena is not liable, but contends that the trial court erred in entering judgment for the defendant county.

The patient, aged 64 years, lived and worked in Avena township, in the defendant county, for about four or five months before his illness. Before that his home was in Oklahoma. Shortly before his illness he had been employed for a short time at a tavern in such township, but his employment had ceased on a Thursday. The following Saturday he visited the tavern and on leaving fell and injured his leg. Some one helped him into a cabin back of the tavern where he was put in bed. On the following Monday a local doctor, at the request of one of the tavern-keepers, Matheny or Nally, examined him and prescribed some medicine. The doctor testified that a few days later the patient had developed

1.

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David J. Mallitt
CLERK OF THE COURT

a cold, had a temperature of 103½ degrees, was threatened with pneumonia and was a very sick man, and the doctor advised that the patient be taken to a hospital and should have a trained nurse. Such doctor was paid for his services by the tavern-keepers. The following day, March 4, 1939, the patient was taken, evidently by or at the instance of the tavern-keepers, to the hospital of the plaintiff where he received the services sued for.

At the time of leaving the hospital he was able to walk with the aid of crutches, and at such time the supervisor of Avena township furnished him a coat and hat and a "one-way" bus ticket to Okalhoma.

Neither tavern keeper testified. No one testified as to what transaction or conversation took place at the time the patient entered the hospital, except as shown by the testimony of the witness Ruedger hereinafter referred to. The hospital record of his entry, admitted without objection, contains this statement, "James B. Nally will make arrangements & be responsible for the bill."

The patient testified that at the time of entering the hospital he was delirious and had no recollection of entering the hospital and did not know how he got there; that it was several weeks before he remembered anything; that at the time of receiving the injury "I did not have any money at all. Probably had three or four dollars. Other than that I didn't own any property." There is no testimony to the contrary.

Ruedger testified that he had been looking after collections for the plaintiff and for the local doctor's clinic since 1939; that he saw the patient at the hospital at least twice a week; that during all of the first two or three weeks it was impossible to hold an intelligent conversation with him; that after the patient partially regained control of himself and late in March, 1939, the witness first learned that the patient had no finances.

Ruedger further testified that he first talked with the

supervisor of Avena township at the latter's home sometime early in May, 1939, after the patient had been at the hospital about two months; that he then told the supervisor that the patient was desperately ill and would need either county or township support on his further hospitalization and medical attention; that the supervisor replied that he did not know the man but would consult the State's Attorney; that thereafter he saw the supervisor several times, but the latter did not feel the township was responsible because the man had not been "pauperized".

Ruedger further testified that at the time the patient was received in the hospital it was understood the hospitalization service would be covered by insurance and that after he found the insurance did not cover the patient the witness went to the supervisor.

The then supervisor of Avena township testified that he was not acquainted with and never saw the patient; that he first learned of the patient being in the hospital when he received a bill for \$525. from the hospital for six months treatment; that later Ruedger came to see him "once in a while" about the bill; that "I know Lautzenheiser was in the hospital from the first time I talked with Ruedger"; that he first talked with Ruedger about six months before the patient left the hospital; that such first conversation with Ruedger took place about "six or eight months before he left the hospital"; that "I did not take any action upon the bill when it was first presented to me, and I never took any action after I talked with Ruedger. I presented the bill to the county and it came up before the board." He further testified that he never made any promise to the hospital that he would take care of the services in question.

An itemized statement was introduced in evidence without objection, which showed each day's charge for such hospitalization, and it was proven that the charge of \$2.50 per day was reasonable.

The action of the plaintiff against the defendant county

is based on Paragraph 25, Section 24, Chapter 107, Illinois Revised Statutes, 1939, which reads as follows:

"When * * * any person not coming within the definition of a pauper, of any * * * county * * * shall fall sick or die, not having money or property to pay his board, nursing and medical aid or burial expenses, the overseer or overseers of the poor of the * * * town * * * in which he may be shall give, or cause to be given to him such assistance as they may deem necessary and proper * * *; and the county shall pay the reasonable expense thereof, which expenses of board, nursing, medical aid * * * may be recovered * * * from the county of which he is a resident, in an appropriate action."

Section 18 of the same statute made the supervisor of the township in question the ex-officio overseer of the poor of such township.

In our opinion the evidence clearly shows that when the patient was admitted to and while he was in the hospital he did not have sufficient money or property to pay his hospitalization, and was within the class of persons entitled to hospitalization under Section 24 of the Paupers Act. (See Rock Island County v. App, 118 Ill. App. 521; County of Kankakee v. Town of Manteno, 63 Ill. App. 365; Buckmaster v. County of Effingham, 302 Ill. App. 353.) Although he had previously earned his living and was not technically a pauper, the only property he had at the time of entering the hospital was three or four dollars, and the only moneys he actually received thereafter was \$25. insurance.

The cases have dispensed with the necessity of prior notice to the overseer of the poor, where hospitalization or medical assistance is urgently required, and it is not feasible to notify the overseer prior to the giving of the assistance to the needy person. The same cases either hold or indicate, however, that notice must be given such overseer within a reasonable time after the emergency treatment begins. (See County of Fayette v. Morton, 53 Ill. App. 552; County of Clinton v. Pace, 59 Ill. App. 576; County of Winnebago v. City of Rockford, 61 Ill. App. 656; County of Madison v. Haskell, 63 Ill. App. 657; City of Chester v. County

of Randolph, 112 Ill. App. 510; Deason v. County of Williamson, 188 Ill. App. 316.)

The basis of the decisions which allow recovery without notice is that the emergency shown in each of such cases dispensed with the necessity of notice. Thus in County of Christian v. Rockwell, supra, a boy had been shot in the leg, making necessary prompt amputation, and "there was no time to apply for aid to any county official;" in County of Clinton v. Pace, supra, a man's leg was broken, and immediate treatment was needed; and in Deason v. County of Williamson, supra, the court said, that victims of a cyclone within the class in question could be treated by a physician "Where prompt and immediate action is required without notice to or permission from the supervisor."

The plaintiff seeks to justify its failure to more promptly notify the overseer of the poor on the ground that an emergency existed when the patient was received at the hospital, but the undisputed evidence shows that such failure was not in fact based on any emergency whatever. The principal witness for the hospital, Ruedger, made this plain. He testified that at the time the patient was received it was understood that the hospital services would be covered by insurance from some source, that that was where the plaintiff was looking for compensation at that time, and that after the witness found out that insurance did not in fact cover the patient, then the witness went to the overseer of the poor.

It is therefore our opinion that the trial court properly disallowed the claim of the plaintiff for hospitalization prior to the time when the overseer of the poor was actually notified of the hospitalization being given.

The evidence is conflicting as to when such overseer was first advised of the services rendered and being rendered. On this question only two witnesses testified, viz., the overseer, who testified for the defendant, and Ruedger, who testified for the plaintiff. The testimony of the overseer most favorable to the

defendant is that it was six or seven months before he learned that the patient had received and was receiving such treatment. Ruedger testified that he first advised the overseer early in May, 1939, after the patient had been at the hospital about two months. Although the overseer contradicted himself by later testifying that his first conversation with Ruedger was about six months before the patient left the hospital, the question of fact as to when such overseer was first advised was primarily a question for the trial court to determine. In any event the undisputed evidence is that the overseer was duly notified at least six or seven months after the patient entered and about three or four months before he left the hospital, yet the supervisor, after being notified, took no action except to disclaim liability. His inaction under the circumstances did not exempt the county from liability for the services rendered after the overseer was actually notified, and the trial court should have entered judgment for the plaintiff for such services rendered during such period. (Seagraves v. City of Alton, 13 Ill. 386.)

Defendant argues that "at the time of the patient's confinement the evidence discloses an agreement was entered into by and between the agent of the hospital and one James B. Nally, by the terms of which Nally agreed to pay any hospital bill which the patient might incur," and that therefore plaintiff was not entitled to any recovery whatever. This argument amounts to a mere inference or conclusion based only on the entry on the hospital record heretofore quoted and on the statement in the plaintiff's brief (though not in the record) that Nally was present when the patient entered the hospital. We see no merit to this contention. Assuming, that Nally did agree to pay such bill at the time the patient entered the hospital, the fact remains that the bill was not paid, the patient continued to be in need of and to be entitled to hospitalization at the expense of the county, and it is not denied that eventually the plaintiff, through its agent Ruedger, notified the

overseer that the patient was desperately ill and needed either county or township support for his further hospitalization. It then became the duty of the overseer to see that relief was given, which he did not do. From that time on the defendant county was liable for the relief thereafter given. Although he was in Effingham county when he received the hospitalization, he was still a resident of Fayette county and entitled to relief from such county. (Rock Island County v. App, 118 Ill. App. 521.)

As to the defendant township the judgment is affirmed.

As to the defendant county, the cause is reversed and remanded for further proceedings consistent with this opinion.

Approved in part, but reversed and
remanded with directions.

Abstract

STATE OF ILLINOIS
APPELLATE COURT
FOURTH DISTRICT

FILED

David J. Mallitt
CLERK OF THE APPELLATE COURT
FOURTH DISTRICT OF ILLINOIS

October Term, A. D. 1941

Term No. 41030

Agenda No. 5

KASSLY UNDERTAKING COMPANY)
and JOHN KASSLY,)
Plaintiffs-Appellees,)
vs.)
THE FLXIBLE COMPANY, a Corpora-)
tion,)
Defendant-Appellant.)

Appeal from the
City Court of the
City of East St. Louis
St. Clair County,
Illinois.

DADY, J:

313 I.A. 633²

722
114

Defendant appeals from a judgment for Nine Hundred Sixty (\$960.00) Dollars, rendered against it in an attachment proceeding.

As a basis for the attachment proceedings, an affidavit made by John Kassly was filed with the clerk of the trial court on April 14, 1941, in which it was alleged that the defendant, a non-resident corporation, had sold an ambulance to the plaintiff under the name and style of Kassly Undertaking Company, and had warranted it to be constructed of first-class materials and workmanship, and that the warranty had failed to the extent of Nine Hundred Sixty (\$960.00) Dollars. In the caption of the affidavit the plaintiff was described as "Kassly Undertaking Company" and the affidavit was signed "Kassly Undertaking Company by John J. Kassly, affiant".

On April 18, 1941, defendant filed its limited appearance, and motion to dismiss the suit and quash the writ on the ground that the affidavit purported to be signed by the Kassly Undertaking Company by its agent and that it did not appear in the affidavit that the person who signed it was the agent of the plaintiff. The denial of this motion by the trial court is the first error assigned by defendant.

Section 2 of the Attachment Act, Illinois Revised Statutes, Chapter 11, Paragraph 2, provides that "to entitle a creditor to such a writ of attachment, he or his agent or attorney shall make and file with the Clerk of such court an affidavit. . .". Although the Act does not make any such express requirement, defendant contends that if an affidavit is made by an agent, it must affirmatively appear from the affidavit itself that the affiant is acting as the agent of the creditor bringing the suit. The fallacy of defendant's argument as applied to the facts of this case, is that the person making the affidavit, that is, John Kassly, appears to be one of the creditors in the suit and as such, would clearly be entitled to make his own affidavit. In the affidavit the claim is made that the defendant is indebted to "plaintiff, Kassly Undertaking Company, and this affiant" (being John Kassly). In the complaint which was filed on April 16, 1941, two days prior to defendant's motion, John Kassly was named as plaintiff along with the Kassly Undertaking Company, and the claim was there made that the defendant was liable to both plaintiffs by reason of the breach of the alleged warranty in connection with the sale of the ambulance.

It appears from the evidence that at the time of the filing of suit, the Kassly Undertaking Company was a co-partnership consisting of John Kassly as the managing partner and certain members of his family as dormant partners. In this situation John Kassly, as the sole active partner in the partnership, would be entitled to sue without joining the dormant partners as party plaintiffs. (Lasher v. Colton, 225, Ill. 234) Although the defendant did not raise the question, the Kassly Undertaking Company, as a partnership, would have no legal capacity to bring suit in the partnership name, and John Kassly appears to be the only plaintiff in the suit with the legal capacity to sue. Whatever its other faults may have been, the affidavit in this case was not vulnerable to the particular objection made by defendant, and the trial court properly denied defendant's motion to dismiss

the suit and quash the writ.

After the denial of this motion, defendant filed a second motion to dismiss on the ground that the Kassly Undertaking Company was a co-partnership composed of John Kassly and certain other named members of his family, who it was alleged, should have been joined as parties plaintiff. This motion was also denied and defendant has assigned this as an additional error.

Under the rule laid down in Lasher v. Colton, supra, the dormant partners of the plaintiff John Kassly were not necessary parties plaintiff. Moreover, even assuming that the other partners were necessary parties and that they should have been joined as plaintiffs in the suit, Section 26 of the Civil Practice Act, Illinois Revised Statutes, Chapter 110, Paragraph 150 provides that "no action shall be defeated by non-joinder or misjoinder of parties." Because of this section, defendant was clearly not entitled to a dismissal of the suit.

After the denial of this motion, the cause was tried before a jury upon complaint and answer.

The only other alleged error argued by defendant is that, on the basis of the evidence introduced, the trial court improperly denied the defendant's motion for a directed verdict. By its answer the defendant expressly admitted that at the time of selling the ambulance, it promised and warranted that said ambulance was constructed of first-class material and workmanship and was in proper condition and fit to be used for ambulance service. No question has been raised as to the excessiveness of the judgment. The sole question presented is whether plaintiffs have shown a breach of the express warranty. The principal alleged defect was in the construction of the brakes of the ambulance, which plaintiffs claim were not large enough properly to brake the ambulance. The plaintiffs claim that the defective brakes were responsible for one accident in which the ambulance was involved, causing substantial damages, and that at least on fifteen different occasions the ambulance was laid up for repairs by reason of such defective brakes.

Defendant has filed a purported abstract of the testimony covering 130 printed pages. The testimony is set out practically in haec verba, even in the form of questions and answers, instead of being condensed in narrative form so as to present its substance clearly and concisely as provided by Rule 8 of this court. Under these circumstances we would be justified in refusing to consider any of the questions raised with reference to the sufficiency of the evidence, and in the absence of any other error, in affirming the judgment pro forma. Notwithstanding defendant's flagrant violation of the rule, we have considered the evidence and we are of the opinion that a prima facie case of liability was made, and that defendant was not entitled to a directed verdict.

We find no error in the judgment and it is accordingly affirmed.

AFFIRMED.

41819

HALLIE E. McCOWAN,

Plaintiff - Appellee,

v.

DON C. McCOWAN,

Defendant - Appellant.

APPEAL FROM

SUPERIOR COURT

COOK COUNTY.

313 I.A. 634

131

MR. JUSTICE HEBEL DELIVERED THE OPINION OF THE COURT:

This is an appeal from an order entered in the Superior Court of Cook County on April 17, 1941. The plaintiff filed her complaint in December, 1938, for separate maintenance, after a marriage to defendant. Plaintiff's first motion in this separate maintenance suit was for temporary support and solicitor's fees, and was denied. Thereafter, defendant filed his counterclaim for divorce. While the actions were pending an order was entered on March 5, 1940 allowing the plaintiff temporary support money of \$20.00 per week and temporary solicitor's fees of \$1,500.00, and for an amount to be paid the special commissioner. Defendant appealed to this court from said order of March 5, 1940 in cause No. 41399, and a supersedeas bond in the sum of \$500 was filed by defendant on June 21, 1940. While this appeal was pending, the main issues came on before the trial court for hearing, and a final decree was entered on July 5, 1940, which decree dismissed the complaint and counter-complaint for want of equity. On October 2, 1940, while the former appeal, No. 41399, was pending, plaintiff procured an order for the allowance of \$500 to defend said appeal. On February 26, 1941, this court rendered its opinion in said former appeal, No. 41399, and thereby affirmed the allowance of temporary support and solicitor's fees as provided in the order of March 5, 1940, but reversed, modified and remanded the allowance for the special commissioner.

41318

H. L. L.
Plaintiff -

v.
DON C. McTIGUE,
Defendant -

at 10:00 A.M.
This is an account from an order referred to the Superior
Court of Cook County on April 17, 1941. The said order was
complaint in December, 1939, for an order to maintain, after a
marriage to defendant. Plaintiff's first motion in this regard
maintenance suit was for temporary maintenance and attorney's fees,
and was denied. Thereafter, defendant filed a counter-motion for
divorce. While the action was pending, a decree was entered on
March 5, 1940, following the plaintiff's motion for temporary
\$20.00 per week and attorney's fees, and
for an amount to be paid defendant.
appealed to this court from said order of March 5, 1940 in cause
No. 41398, and a supersedeas bond in the sum of \$500 was filed by
defendant on June 21, 1940. Also this court was advised, the
main issues came on before the said court for hearing, and a final
decree was entered on July 3, 1940, which decree dissolved the
complaint and counter-complaint for want of a wife. . . .
1940, while the former
procured an order for the wife's use of
On February 21, 1941, this court rendered its decision in said matter
appeal, No. 41398, and the wife
support and attorney's fees
1940, but reversed, and
special commissioner.

On April 3, 1941, plaintiff filed her petition in the Superior Court, praying for an additional allowance of \$500 for attorney's fees for having defended said appeal. By court order of April 3, 1941, leave was given the plaintiff to file her said petition, and defendant was given leave to file his written answer to said petition. On April 17, 1941, the court entered an order which provided; (1) for the entry of a judgment upon the order of May 5, 1940 in the sum of \$1,930, (2) for an order upon the surety company to turn over the \$500 specified in the appeal bond, (3) for the reduction of the special commissioner's fees to \$58, and (4) for the payment by defendant to the plaintiff of an additional \$500 for attorney's fees and costs expended by plaintiff in defending Appeal No. 41399. It is from this order that defendant appeals. The order appealed from, entered on April 17, 1941, is predicated upon plaintiff's petition of April 3, 1941, and that petition is the only pleading essentially involved in this appeal.

The defendant contends that the final decree of July 5, 1940, which dismissed the main issues for want of equity, left the court without jurisdiction on April 17, 1941, to render judgment for the plaintiff and against defendant for \$1,930 which amount represented the former allowance of temporary support money and temporary solicitor's fees, and further suggests that the final decree of July 5, 1940, made the former allowance of temporary support money and solicitor's fees unenforceable, and left the parties as husband and wife, and therefore, neither party could maintain further litigation against the other, except as provided by statute. While it is true that the final decree of July 5, 1940, which dismissed for want of equity the plaintiff's complaint and defendant's cross complaint for divorce, left the parties to this action in the status of man and wife, it does appear from this decree that the court reserved jurisdiction as to the temporary allowance of support money and solicitor's fees. The decree provided;

"It is hereby ordered, adjudged and decreed that the complaint of the plaintiff and the counter-claim of the defendant herein be, and the same are hereby dismissed for want of equity, and the entire cause dismissed save and except for the matters contained in and relative to the order of this Court entered on March 5, 1940 by Judge John C. Lowe, and pertaining to the question of alimony pendente lite, temporary solicitor's fees and Special Commissioner's report which are hereby transferred to said Judge for his action, if any."

The defendant, however, suggests that this judgment order was erroneous for two reasons; first, the dismissal of the main issues for want of equity made the temporary orders unenforceable, and second, the order of the judgment in favor of a wife and against her husband is contrary to the well established law, and cites the opinion of the Supreme Court in Chestnut v. Chestnut, 77 Ill. 346. It appears in that case that the court entered a judgment on an award for temporary support money after the dismissal of the complaint for divorce. The Court, upon the question of the authority of the court to enter such an order, said;

"But aside from this view, upon principle, it would appear that the dismissing of the bill would operate to revoke the order allowing temporary alimony. Such a provision is for her immediate support, and to enable her to meet the expenses of her defense pending the litigation. When the bill was dismissed, the husband's common law liability to support his wife was revived, and the necessity for alimony did not exist. It will be presumed he discharged his obligation in that regard, and at all events the liability remained, and it would be oppressive to impose upon him the payment of an additional sum deemed sufficient to support her if living separate and apart from him."

In citing authorities upon like questions, the defendant suggests that it was improper to reduce to judgment the amounts accrued under the order of March 5, 1940, which provided for temporary support money and solicitor's fees, as the order for judgment of April 17, 1941, was entered subsequent to the decree of July 5, 1940. As herein stated, on April 17, 1941, the parties hereto were and still are husband and wife. Defendant urges that it was, therefore, error to enter a judgment in favor of the wife and against her husband, and contends that only where the statutes of our State

Commissioner's report which he made to the Board for his action, if any."

The defendant, however, made no effort to contact the

[illegible][illegible][illegible]

under the street in front of the house.

10. IMPROVED COORDINATION OF THE POLICE AND PROSECUTOR'S OFFICES

APR 11 1961

As per the above, the following information is being provided for your information:

THE UNIVERSITY OF CHICAGO PRESS

REPORT TO CHIEF OF BUREAU OF THE BUREAU OF THE ARMY

provide for litigation between husband and wife, can the same be carried on, and cite Chap. 68, Ill. Rev. Stat. 1939. It is urged that if pending divorce or separate maintenance actions have been abated, so that the parties are man and wife, no litigation can be carried on between them, as they are one in the eyes of the law.

The plaintiff, however, in answering the defendant's theory, contends that the entry of judgment on April 17, 1941, upon the order previously entered on March 5, 1940 for support money and temporary solicitor's fees was proper, and calls attention to the fact that the order entered on March 5, 1940 was affirmed by this court in McCowan v. McCowan, 308 Ill. App. 669. From this suggestion it appears that the time for filing a petition for rehearing has long since elapsed, yet defendant now urges the same arguments and theories as in the previous appeal. It appears from what was said by this court on the previous appeal that "having considered the facts and evidence and the law, the order of March 5, 1940 is affirmed as to the allowance of temporary alimony and solicitor's fees"; and, therefore, so far as the question of the validity of the order of March 5, 1940 is concerned, it is res adjudicata.

The question here is whether the trial court had the jurisdiction to make an allowance to the plaintiff for solicitor's fees and costs to defend an appeal by the defendant. It is provided in Chap. 40, sec. 16, Ill. Rev. Stat. 1939, that;

" * * * In case of appeal by the husband or wife, the Court in which the decree or order is rendered may grant and enforce the payment of such money for her or his defense and such equitable alimony during the pendency of the appeal as to such court shall seem reasonable and proper * * *"

It does not appear that there is any question here of alimony pending appeal, the only controversy being the allowance of attorney's fees. The defendant insists that it was error for the court to enter the order for additional attorney's fees because the petition was not verified and no evidence was taken prior to its entry. It would appear that the allowance of additional attorney's fees and costs for defending

that appeal is governed by the above section of the statute, and that there is there no requirement that application for such allowance be made by verified petition, nor that evidence be taken as a prerequisite for such allowance. The statute states that such allowance shall be made, "as to the Court shall seem reasonable and proper". The defendant's answer to plaintiff's petition for an additional allowance does not raise the objection that evidence should have been taken prior to the entry of any such order nor that the petition is not verified, and plaintiff urges that, since these contentions are now urged for the first time on this appeal, they should not be considered by this court. There is no suggestion by the defendant that the allowance of the additional amount is excessive. In the previous appeal, McCowan v. McCowan, 308 Ill. App. 669, the court found that hearings had been held before a Special Commissioner in conformity with the statute, "to take and report evidence with reference to the conditions in life of the parties and their circumstances * * *" and that such a report had been filed. The trial court had knowledge of the status of the parties and that the defendant was worth approximately \$30,000.00 with an annual income of \$10,000.00. If such status had changed the defendant should have so stated in his answer to the petition. The allowance being proper, therefore, as to amount, we are of opinion that there is no basis for defendant's objection that evidence was not taken prior to the entry of the order.

The defendant wishes the court to note that the order of October 2, 1940, calls for the payment of the sum of \$500 on the date of its entry, and further that if the amount is paid under the terms of the order it shall be allowed as a credit to the defendant. The defendant insists that this order is res adjudicata as to any further allowance for defending that appeal. It does not appear, however, that defendant has paid anything under said order, (nor that he has complied with any order entered upon him by the trial court or this court.) The record in this court is silent as to

defendant paying any money, nor does he advance the theory that he has made payments which should be credited to him in reaching the amount due. The plaintiff urges that the defendant having failed to comply with the order of October 2, 1940, he cannot be heard to insist upon whatever benefit it might have afforded him had he so complied. We are of the opinion that there is sufficient in the record to justify the court in allowing an additional \$500 under the above quoted statute for defense of the appeal.

On the question of whether, after the dismissal of the complaint and counterclaim of the parties, the court was in a position to enter a judgment for the full amount that was due from defendant as temporary alimony and solicitor's fees, the case of In Re Est. of Ball, 210 Ill. App. 350, is cited. There the court said upon questions of like character:

"The order to pay alimony was a judgment of the court. After judgment it became a vested right which could not be divested by a subsequent order of the court. The affirmance of that judgment on appeal made it final. Gordon v. Baker, 182 Ill. App. 587; Cole v. Cole, 142 Ill. 19; Craig v. Craig, 163 Ill. 176.

"While the death of the husband abated the suit, nevertheless the amount due to the time of such death is recoverable by the widow and is properly a debt provable against decedent's estate. Dinet v. Eganmann, 80 Ill. 274, is, we think authority for this holding. In that case, where the wife had died, the alimony decree was enforced against the husband for the amount unpaid under the decree at the time of her death. We think the converse of this proposition, presented in this case, is by parity of reasoning likewise maintainable. As said in Knapp v. Knapp, 134 Mass. 353: 'If a writ of scire facias can be brought against the husband to obtain an execution against him for alimony, which, by a decree of the court, he has been ordered to pay, there is no good reason why the same process should not be used to enforce such a decree by obtaining execution against his estate for arrears of alimony due at the time of his death'."

In the instant case, plaintiff filed her petition on April 3, 1941 for the entry of a judgment upon the order previously entered for support money and temporary solicitor's fees, and on April 17, 1941 judgment was entered for the full amount due and unpaid by the defendant under said previous order, and execution ordered to issue therefor. After considering the questions involved, we believe the judgment order to be proper.

[illegible]

There is a question called to our attention by the defendant regarding the court's order that the Hartford Accident & Indemnity Company pay over to plaintiff the \$500 specified in the appeal bond, contending that the respective rights of the principal and surety named in the bond could only be determined in an action on the bond. The amount was paid by the surety company in open court and credit given to defendant for that amount, and we do not think the objection of defendant well taken.

For the reasons stated the judgment order of April 17, 1941, entered upon plaintiff's petition, is affirmed.

JUDGMENT ORDER AFFIRMED.

BURKE, P.J. AND KILEY, J. CONCUR.

41661

BETTY LOIS SMITH,

Plaintiff - Appellee,

v.

FERDINAND J. KARASEK, WILLIAM AWE
AND OSCAR M. MEUSEL,

Defendants - Appellants.

APPEAL FROM

MUNICIPAL COURT

OF CHICAGO.

3131.A. 634²

MR. JUSTICE KILEY DELIVERED THE OPINION OF THE COURT.

This is an appeal from a summary judgment for \$329.00 against the defendants in an action upon a note in the Municipal Court of Chicago. The defendant Awe did not join in the appeal.

Plaintiff confessed judgment in the trial court on January 17, 1940 for \$405.03. The note upon which judgment was confessed was made June 7, 1938 in the amount of \$700.00, payable January 2, 1939, to plaintiff's order with interest at six per cent per annum and is signed by the three defendants. On April 19, 1940, the defendants Karasek and Meusel, attorneys, filed a sworn petition to set aside and vacate the judgment, and on July 9, 1940, by leave of court, filed a sworn amendment to said petition. July 12, 1940, the trial court gave leave to these defendants to appear and defend, with the judgment to stand as security, and ordered the plaintiff to answer defendants' pleadings which were ordered to stand as their affidavits of merits. July 22, plaintiff replied and on September 19, 1940, on motion of plaintiff summary judgment was entered for her in the sum of \$329.00.

The defendants to reverse the judgment contend that the note is expressly and impliedly admitted to be usurious as to part of the principal and interest and that the note, therefore, is void and uncollectible; and that plaintiff's motion for summary judgment should have been denied, since her attorney, and not plaintiff, made the affidavits in her pleadings and since triable

531

$\frac{d}{dt} \left(\frac{\partial L}{\partial \dot{x}} \right) = \frac{\partial L}{\partial x}$

1990 - 1991

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1. The first step is to identify the problem or goal. This involves understanding the current situation and what needs to be achieved.

1. The first part of the report is a general introduction to the subject of the study. It discusses the importance of the study and the objectives of the research.

11. The above information was obtained from the records of the [redacted] and [redacted] and is being furnished to you for your information.

10. The above information is true and correct to the best of my knowledge and belief.

issues of fact were presented by the several pleadings. The plaintiff denies usury in the principal but admits usury of the interest and contends that by having the judgment reduced by the amount of the usury, the defect was cured and the principal amount not affected; that plaintiff's sworn pleadings were proper affidavits for summary judgment; and that because no triable issues were presented by the pleading, the court properly entered judgment for plaintiff.

Plaintiff seeks in this court, attorney's fees in the sum of \$42.20, and ten percent damages under Section 23 of the Costs Act because she says the defendants have admitted the indebtedness. The question of the attorney's fees was not presented to the trial court and is not before us; and we cannot find from the record before us that this appeal is prosecuted for delay, consequently, we need not consider whether the section of the Costs Act cited is applicable.

We shall consider first the technical objections to the summary judgment. The defendants contend that the notice of plaintiff's motion, pursuant to which summary judgment was given in the trial court, did not include notice of a motion for said judgment and that no such motion was made; and that plaintiff's pleadings were not sworn to by plaintiff as required by section 72 of the Civil Practice Rules of the Municipal Court. It is true that notice of plaintiff's motion did not cover a motion for summary judgment, but the defendants were in court in response to the notice, had been permitted to and did file an original and amended affidavit of defense, and we can find no prejudice suffered by them. While the record does not show a written motion by plaintiff for summary judgment, the court, nevertheless, had before it the several sworn pleadings of the parties and the parties themselves, the record indicates the motion was made and we find no error on the part of the court in entertaining such motion. These defendants, who are attorneys, made no motion in the trial court to strike plaintiff's pleading for want of proper affidavit and, consequently, the point cannot be urged here.

Both parties agree that the law of this State does not permit a summary judgment where triable issues of fact appear from the pleadings. The test is in the facts alleged in defendants' affidavit of merits and plaintiff's sworn reply.

The defendants' material allegations admitted by plaintiff's reply are that though the note is for \$700.00, the original judgment was for \$405.03, including principal and interest and attorney's fees; that there is no notation on said note of an interest payment of \$21.00 made to plaintiff January 24, 1939 by the defendant Awe; that the note shows no payment of principal and the judgment confessed is less than the face amount of the note. Plaintiff further admits that the interest payment of \$21.00 made by Awe was usurious; that the loan was a transaction exclusively between the plaintiff and Awe; that the \$21.00 interest payment was on the sum of \$350.00 which was the amount of the loan, and that the balance of the face value of the note represented a bonus which Awe promised to pay the plaintiff, but upon which no interest was to be paid. Plaintiff's reply denies the allegations of the defendants that the note is a usurious contract, tainted with usury; that the usurious part and the lawful part are inseparable and the entire note unenforceable; that the actual amount of the loan was not disclosed to the defendants; that though the note was prepared by the defendant Meusel and presented to Karasek, the latter was wholly unaware of the amount loaned and unaware of the secret agreement between plaintiff and Awe as to the face amount of the note and the actual amount of the loan; that neither is indebted to plaintiff and no demand was made on them for payment; that plaintiff in a letter of July 26, 1939, admitted that the note was usurious and tainted with fraud and that she would divide the \$350.00 with these defendants should a judgment for \$700 be confessed against Awe; that it is evident from the pleadings of

these defendants, that (a) plaintiff is not a holder for value; (b) that she falsely represented the amount of the loan; (c) that she fraudulently induced these defendants to sign a note for \$700.00, each one of these defendants believing the loan was for \$700.00 instead of \$350.00, that they did not know the note was usurious, that if they knew the note was for \$350.00 instead of \$700.00, they would not have signed; that she made false representations knowing them to be false and material, that such representations were relied upon by these defendants who acted thereon to their damage; (d) that the note is unlawful, usurious, etc., and (e) that knowing the note is unlawful and usurious, she still persists in collecting and enforcing the note; that these defendants have a complete defense.

Valid inferences from the facts well pleaded by the defendants are that while they complain in general terms of usury, their detailed allegation limits the charge of usury to the interest payment of \$21.00; that though they claimed fraud was practiced upon them because the loan was for only \$350.00 and the note for \$700.00, no fraud appears from the facts alleged and the record discloses that only \$350.00 principal was sought and recovered by plaintiff in her original judgment and in the summary judgment she accepted a reduction in the amount of the admittedly usurious interest; that while these defendants claim the note was without consideration, they admit its validity by not denying plaintiff's charges that they confessed their liability upon the note in a letter to the plaintiff, as will appear hereinafter.

Plaintiff's reply set out as new matter, that she received a letter from these defendants June 21, 1938, which advised her that they joined with Ave in signing the note as signers and not only as sureties and that they, therefore, had become primarily and not secondarily liable, and that if the note was not paid she

these defendants, that (a) the note was not a bill of exchange.

(b) that the note was not a bill of exchange, and that it was not a bill of exchange.

that the defendants had no right to the note, and that the note was not a bill of exchange.

for 1700.00, and one of these bills of exchange was not a bill of exchange.

for 1700.00, and one of these bills of exchange was not a bill of exchange.

neurons, that if they knew the note was not a bill of exchange, they would not have signed it.

1700.00, they would not have signed it, and they would not have signed it.

tions knowing that the note was not a bill of exchange, and that the note was not a bill of exchange.

were not aware of the fact that the note was not a bill of exchange, and that the note was not a bill of exchange.

damage; (c) that the note was not a bill of exchange, and that the note was not a bill of exchange.

that knowing the note was not a bill of exchange, they would not have signed it, and that the note was not a bill of exchange.

in collecting and receiving the note; that the note was not a bill of exchange, and that the note was not a bill of exchange.

a complete bill of exchange, and that the note was not a bill of exchange.

defendants, and that the note was not a bill of exchange, and that the note was not a bill of exchange.

their actions, and that the note was not a bill of exchange, and that the note was not a bill of exchange.

payment of 1700.00, and that the note was not a bill of exchange, and that the note was not a bill of exchange.

upon them, and that the note was not a bill of exchange, and that the note was not a bill of exchange.

1700.00, and that the note was not a bill of exchange, and that the note was not a bill of exchange.

disclosed that they had signed the note, and that the note was not a bill of exchange, and that the note was not a bill of exchange.

plaintiff to be satisfied, and that the note was not a bill of exchange, and that the note was not a bill of exchange.

accorded a receipt in the amount of 1700.00, and that the note was not a bill of exchange, and that the note was not a bill of exchange.

interest; that while the note was not a bill of exchange, and that the note was not a bill of exchange.

consideration, they did not sign the note, and that the note was not a bill of exchange, and that the note was not a bill of exchange.

charges that they had signed the note, and that the note was not a bill of exchange, and that the note was not a bill of exchange.

letter to the plaintiff, and that the note was not a bill of exchange, and that the note was not a bill of exchange.

that the note was not a bill of exchange, and that the note was not a bill of exchange.

only as evidence in the case, and that the note was not a bill of exchange, and that the note was not a bill of exchange.

at the time of the signing of the note, and that the note was not a bill of exchange, and that the note was not a bill of exchange.

could confess judgment against them and obtain a lien upon all their property and possessions and that those statements constituted her security. The reply further alleges that she gave \$350.00 in United States dollar bills as consideration for the note. The new matter was not met by any additional pleading of the defendants and is, therefore, admitted. This new matter overcomes the allegations in defendants' pleading that there was no consideration.

The defendants contend that because of the usurious interest, and the fact that the note on its face is for \$700.00 whereas the actual consideration therefor was but \$350.00, the entire note is illegal, in violation of the Interest Act (Chap. 74, Ill. Rev. Stats. 1941), and unenforceable. They argue that part of the principal, \$350.00 over and above the actual loan, is usurious and not separable from the amount of the loan and that under the law in Illinois, the entire contract must fall. We disagree with defendants' contentions. There are no facts well pleaded from which an inference of usury in the principal can be drawn. The plaintiff admits loaning only \$350.00 and she confessed judgment for that amount. The note is not in violation of the Interest Act, but the admittedly usurious interest is, and plaintiff, having accepted \$21.00 in usurious interest, must thereby, under section 8 of that Act, forfeit all interest due on the note. She is entitled to recover the principal, however, under that section and under the uniform rule in the Illinois cases. We have read the cases cited by the defendants in support of their contention. All but one of the cases are inapplicable to the facts here because in them the subject-matter of the principal contract was illegal. The case of Armour v. Moore, 5 Ill. App. 433, cited by plaintiff is applicable here, but the principles announced there support our ruling on this point and do not support defendants' contentions. We conclude,

therefore, that there are no facts pleaded by these defendants from which a reasonable inference can be drawn that the note, subject of this suit, is void for usury.

We hold that no triable issues of fact were presented by the affidavit of these defendants and that no defense to plaintiff's action appeared from these pleadings and, consequently, the trial court properly entered the summary judgment for plaintiff. That judgment is hereby affirmed.

JUDGMENT AFFIRMED.

BURKE, P.J. AND HEDEL, J. CONCUR.

Therefore, the fact that the defendant was not
from which a reasonable inference could be drawn
of this fact, is not sufficient.
The fact that the defendant was not
by the fact that the defendant was not
plaintiff's claim is not sufficient.
The fact that the defendant was not
That judgment is hereby affirmed.

Very truly yours,
[Signature]

WITNESSED my hand and seal of office this 1st day of [Month], 19[Year].



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